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ABSTRACT

In this report the Federal effort to end employment discrimination from July 1975 to August 1977 is reviewed. Among the programs evaluated are the Civil Service Commission's execution of its responsibilities for Federal equal employment opportunity; the Department of Labor's enforcement of the Equal Pay and Executive Order No. 11246; the Equal Employment Opportunity Commission's implementation of Title VII of the Civil Rights Act of 1964; and the activities of the Equal Employment Opportunity Coordinating Council. In addition, the efforts of the Employment Section, Civil Rights Division, of the Department of Justice are analyzed. The methodology utilized for compiling the report is described. Recommendations are offered for the improvement of those programs which require change. (Author/GC)

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ED150224

THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT—1977

TO ELIMINATE EMPLOYMENT DISCRIMINATION: A SEQUEL

U.S. DEPARTMENT OF HEALTH,
EDUCATION & WELFARE
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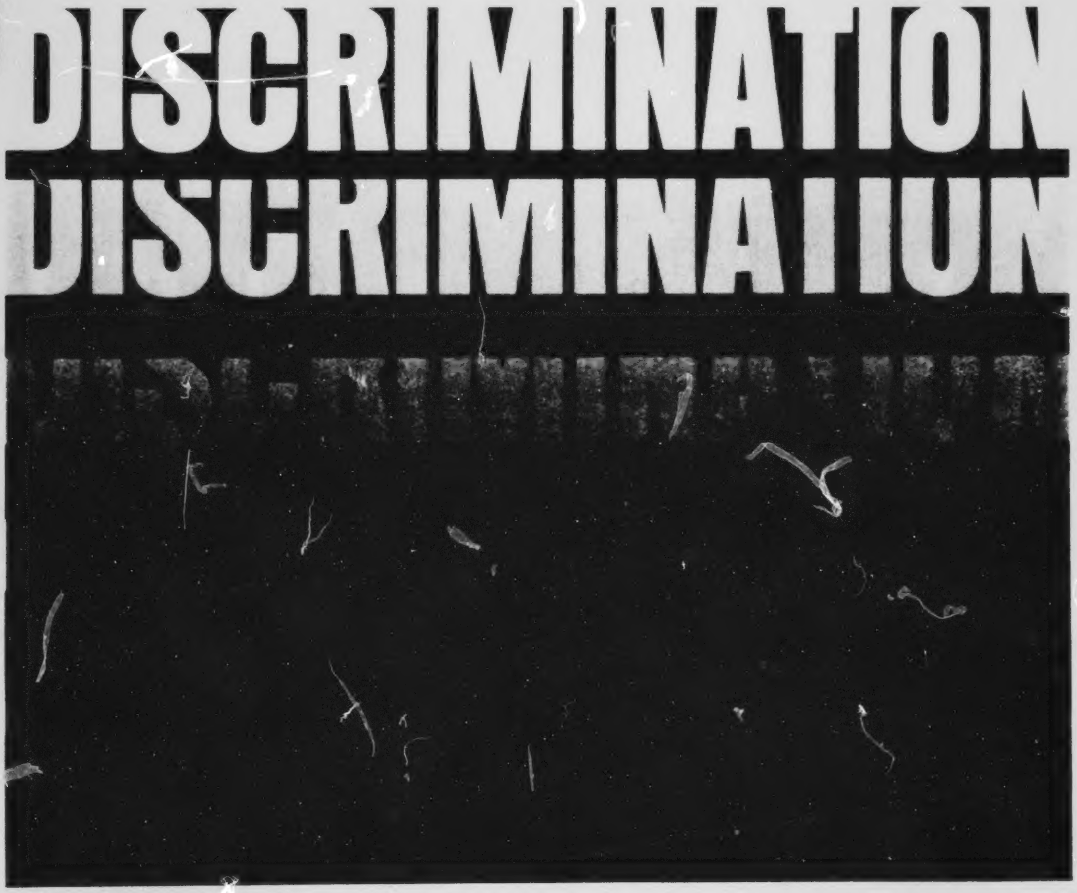

UD017911

A Report of the United States
Commission on Civil Rights
December 1977

U.S. Commission on Civil Rights

The U.S. Commission on Civil Rights is a temporary, independent, bipartisan agency established by Congress in 1957 to:

Investigate complaints alleging denial of the right to vote by reason of race, color, religion, sex, or national origin, or by reason of fraudulent practices;

Study and collect information concerning legal developments constituting a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, or national origin, or in the administration of justice;

Appraise Federal laws and policies with respect to the denial of equal protection of the laws because of race, color, religion, sex, or national origin, or in the administration of justice;

Serve as a national clearinghouse for information concerning denials of equal protection of the laws because of race, color, religion, sex, or national origin; and

Submit reports, findings, and recommendations to the President and the Congress.

Members of the Commission:

Arthur S. Flemming, Chairman
Stephen Horn, Vice Chairman
Frankie M. Freeman
Manuel Ruiz, Jr.
Murray Saltzman

LETTER OF TRANSMITTAL

U.S. Commission on Civil Rights
Washington, D.C. 1977

THE PRESIDENT
THE PRESIDENT OF THE SENATE
THE SPEAKER OF THE HOUSE OF REPRESENTATIVES

SIRS:

The U. S. Commission on Civil Rights presents this report to you pursuant to Public Law 85-315, as amended.

This report evaluates the civil rights activities of most Federal agencies with major responsibilities for ensuring equal employment opportunity: the Civil Service Commission, the Department of Labor, the Equal Employment Opportunity Commission, the Department of Justice, and the Equal Employment Opportunity Coordinating Council. It is a sequel to a 1975 report which the Commission issued on the same subject, *The Federal Civil Rights Enforcement Effort--1974, Vol. V, To Eliminate Employment Discrimination*. It is the twelfth report the Commission has issued describing the structure, mechanisms, and procedures utilized by Federal departments and agencies in their efforts to end discrimination against this Nation's minority and female citizens. The first report in this series was an October 1970 study of the Federal civil rights enforcement effort.

This report is based on a review of documents produced by these agencies, interviews with Federal officials, and an analysis of available literature. A draft of this report was submitted to the agencies for review and comment prior to publication.

We have observed in this report that although in 1977 there have been a number of positive initiatives to strengthen agency compliance programs, most of the basic problems which this Commission identified in 1975 remain unresolved. As of October 1977, most agency efforts for improvement were still in the planning or early implementation stages. Moreover, the agencies had not adequately undertaken elimination of the many problems which cross agency boundaries, including the existence of inconsistent policies and standards and the absence of joint investigative and enforcement strategies.

As we concluded in 1975, the Government's efforts to eliminate employment discrimination will best be served by one agency, enforcing a single law outlawing discrimination on the basis of race, color, religion, sex, national origin, age, and handicapped status. The long range goal of any reorganization plan should be to create such an agency.

We believe, nonetheless, that the immediate creation of a single agency at this time may undercut some of the progress which now appears to be occurring and find that gradual consolidation is more appropriate. However, gradual consolidation, if it is to be effective, must facilitate the prompt accomplishment of certain objectives, including the development of uniform guidelines for employers, the conduct of joint reviews and investigations according to a single compliance standard, and the creation of a final authority to resolve differences among Federal agencies.

We urge your consideration of the facts presented and ask for your leadership in ensuring implementation of the recommendations made.

Respectfully,

Arthur S. Flemming, Chairman
Stephen Horn, Vice Chairman
Frankie M. Freeman
Manuel Ruiz, Jr.
Murray Saltzman

INTRODUCTION

This report evaluates the Federal effort to end employment discrimination. It covers the period from July 1975 through August 1977, and is a sequel to an earlier Commission report on the same subject--Volume V of The Federal Civil Rights Enforcement Effort, published in July 1975. Both this report and Volume V are part of a series of reports introduced by the Commission in October 1970 when it published its first across-the-board analysis of the Government's effort to enforce Federal civil rights requirements. This report is the twelfth the Commission has issued on some aspect of the Federal effort to end discrimination against minorities and women.

This report grew out of a request from the Office of Management and Budget for assistance to President Jimmy Carter's Reorganization Project. As part of his effort to establish an effective organization for the executive branch, President Carter has created a Task Force on Civil Rights Reorganization. The Task Force's first undertaking has been to develop proposals for improving the Federal structure for equal employment opportunity enforcement. In early July 1977, Harrison Wellford, the Executive Associate Director, Reorganization and Management, Office of Management of Budget, wrote to Commission Chairman Arthur S. Flemming requesting that the Commission provide the Task Force with an up-to-date report on the status of Federal activities to assure equal employment opportunity. The Commission, which in Volume V had observed the need for reorganization of the equal employment opportunity functions of the executive branch, agreed.

Most of the investigation and analysis for this report was conducted in a seven-week period, from early July to late August. The President's Reorganization Project hoped to conclude its work in the area of equal employment opportunity in the fall of 1977, and thus the time available for the Commission to conduct research on this topic was short.

The programs covered in this report are similar, but not identical to those covered in Volume V. Both reports evaluate the Civil Service Commission's execution of its responsibilities for Federal equal employment opportunity, the Department of Labor's enforcement of both the Equal Pay Act and Executive Order No. 11246 as amended, the Equal Employment Opportunity Commission's implementation of Title VII of the Civil Rights Act of 1964, and the activities of the Equal Employment Opportunity Coordinating Council. In addition, although not covered in Volume V, this report analyzes the efforts of the Employment Section, Civil Rights Division, of the Department of Justice. Because of the short time frame, through discussions with the Task Force on Civil Rights Reorganization, it was decided to omit a review of the activities of the Bureau of Intergovernmental Personnel Programs at the Civil Service Commission, although these activities were assessed in Volume V.

Because it is meant to be read in conjunction with Volume V, this report does not contain detailed explanations of technical concepts which are explained in full in Volume V. For example, descriptions of affirmative action requirements for Federal contractors and procedures for assuring that employment selection criteria are nondiscriminatory are not repeated in this report. Instead, the report refers the reader to the appropriate pages in Volume V.

The methodology for this report was similar to that used by the Commission for other reports in the *Enforcement Effort* series. In July 1977, copies of the original chapters in *Volume V*, along with the findings and recommendations, were sent to the appropriate Federal agencies, with a request for information on any changes which had occurred since those chapters were written. In addition, a detailed questionnaire was sent to the Department of Justice concerning the activities of the Employment Section. During July and August interviews were held with Washington-based Federal civil rights officials, and documents and data supplied by the agencies were analyzed. Further, interviews were conducted with a number of individuals who are knowledgeable in the area of equal employment opportunity and with representatives of civil rights organizations active in this area. Available literature was also reviewed.

To assure the accuracy of this report, the Commission forwarded copies of it in draft form to the departments and agencies whose activities are discussed in detail, to obtain their comments and suggestions. Their responses have been very helpful, serving to correct factual inaccuracies, clarify points which may not have been sufficiently clear, and provide further updated information on activities undertaken subsequent to Commission staff investigations. These comments have been incorporated in the report. In cases where agencies expressed disagreement with Commission interpretations of fact or with the views of the Commission on the desirability of particular enforcement or compliance activities, their points of view, as well as that of the Commission, have been noted.

The Commission received excellent cooperation from Federal agency administrators and staff. The Commission also received helpful support and advice from private individuals and organizations with civil rights expertise. The efforts of Federal officials are particularly noteworthy because, in many cases, these officials were also simultaneously working on their own agencies' plans for internal reorganization and responding to requests from the Task Force on Civil Rights Reorganization.

The assistance the Commission received from Federal officials appears to be indicative of a newly rekindled level of commitment to effective equal employment opportunity enforcement. It is our observation that there now exists an enthusiasm and determination among Federal civil rights officials for using Federal laws and Executive orders effectively to make employment opportunities in this country truly equal.

This is not to say that this Commission finds that the Government has achieved a reasonable standard of performance in its enforcement posture. Indeed, for the most part there has been little actual progress since 1975. However, the Commission is hopeful that the spirit which it observed in 1977 will result in the productive channeling of the Government's enforcement efforts.

The purpose of these Enforcement Effort reports is to evaluate how well the Federal Government has accomplished its civil rights enforcement mission and to offer recommendations for the improvement of those programs which require change. The Commission will continue to issue periodic evaluations of Federal enforcement activities designed to end discrimination until such efforts are totally satisfactory.

ACKNOWLEDGEMENTS

The Commission is indebted to the following staff members who participated in the preparation of this report under Steven Sacks and Jack Russell, Project Directors, Office of Federal Civil Rights Evaluation:

> Janet Alexander, Mary Avant, Cheryl R. Blake, Sharon Brunson, Almeda Bush, Ruby Chandler, Patricia Cheatham, Althea Foreman, Leopoldo Garza, Treola Grooms, Deborah A. Harrison, Audree Holton, Jeanette Johnson, Nancy Langworthy, Frances C. Lee, Joyce M. Long, Jana McKeag, Mary Moore, Gwen Morris, James Morris, Charles Mueller, David Palés, Kim Ringler, Ola Ross, Roberta Sanders, Franklin Taylor, Carlton M. Terry, Mardon Walker, Brenda Watts, Patricia Williams, and Candy Wilson

The report was prepared under the overall supervision of Cynthia Norris Graae, Director, Office of Federal Civil Rights Evaluation.

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Chapter 1

CIVIL SERVICE COMMISSION (CSC)

FEDERAL EMPLOYMENT

Introduction

In July 1975, when this Commission issued the Federal Civil Rights Enforcement Effort, Vol. V, To Eliminate Employment Discrimination, this Commission observed that the provisions for ensuring equal employment opportunity for Federal employees were not as strong as those provided for employees in the private sector. This chapter, which evaluates the Civil Service Commission's Federal equal employment opportunity efforts from July 1975 through August 1977, finds that this problem continues. However, within the past few months there has been a marked improvement in CSC's approach to its equal employment opportunity responsibilities.

The three Civil Service Commissioners, appointed in 1977, have actively worked toward improving the Government's record of providing equal opportunity in Federal employment, placing special emphasis on the need for affirmative action to increase the number of minority and female Federal employees. CSC is considering a number of potentially significant steps to facilitate effective monitoring of Federal agency affirmative action plans, including authorizing racial and ethnic identification on employment applications and conducting onsite evaluation of the implementation on agency plans.

In addition, the Civil Service Commission, jointly with the Office of Management and Budget, has engaged in the Federal Personnel Management

Project, which is a comprehensive study of Federal personnel management and is part of the President's total Federal executive branch reorganization effort. This project has identified built-in conflicts of interest between the Civil Service Commission's personnel management role and its role as an adjudicator of complaints against the Federal personnel system. Among the options the Project proposes to remedy this problem is the possible creation of an independent counsel to handle appeals, including equal employment opportunity appeals.

The Project has also made a number of specific recommendations for strengthening equal employment opportunity, which if adopted have the potential for eliminating some major barriers to the employment of minorities and women in the Federal Government. For example, the options suggested by the Project include the modification of current provisions for providing preference for hiring veterans, who are more frequently male than female. The Project also suggests as one possible approach to affirmative action, the development by Federal agencies of self-imposed "consent decrees" which would set prescribed goals for hiring minorities and women and would be in operation until past discrimination is corrected.

I. Background

Since 1974, there have been only slight increases in minority and female employment at most levels in the executive branch.[1] Both groups remain heavily concentrated in the lower grades and severely underrepresented at the senior and supergrade levels. As of November 1976, 17.7 percent of all General Schedule employees were minority, an increase of .7 percent since May 1974; 21.3 percent of employees in all pay plans were minority, an increase of .3 percent since 1974. Hispanic employment increased from 2.4 percent to 2.6 percent of all General Schedule positions, a level still below that at which they are represented in the work force as a whole.[2]

Although minorities in levels above grade 15 increased almost 1 percent, from 3.9 percent in 1974 to 4.8 percent in 1976, they were still underrepresented at these levels. Underrepresentation of Hispanics was especially great--they comprised less than 0.9 percent of employees above the GS-15 level.

---

[1] As of January 1977, there were 2.824 million Federal civilian employees, somewhat more than 3 percent of total civilian employment in the United States. Total civilian employment of persons 16 years old and over was 88.588 million in January 1977. Bureau of Labor Statistics, Department of Labor, *Employment and Earnings* (February 1977).

[2] Letter from Alan K. Campbell, Chairman, U.S. Civil Service Commission, to Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights, July 26, 1977 /hereinafter referred to as Campbell letter/. The data in this section were taken from the Campbell letter, unless otherwise indicated. Data for minorities are from November 1976, the most recent data available on minority employment from the Civil Service Commission. Data for women are from 1975, the most recent data available from CSC which are comparable to data provided in *The Federal Civil Rights Enforcement Effort--1974, Vol. V, To Eliminate Employment Discrimination* (July 1975) /hereinafter referred to as *Volume V.*/

Although women increased from 34.0 to 35.3 percent of all employees, they were also represented at a level below that for the work force as a whole.[3] They continued to be concentrated in the lowest four grade levels.[4] In 1975 they constituted 76 percent of the employees in those grades.[5] From 1973 to 1975, women employed at the grade 15 level increased from 2.3 percent of the total jobs at that level to 2.7 percent.[6] If change continues to be so slow, it will be more than 150 years before the representation of women in these higher grade levels is equivalent to their representation in all grades in Federal employment.

Agencies whose employment of minorities and women was identified in Volume V as poor in 1973 and 1974 showed some slight improvements. However, as shown in Exhibit 1-1, these agencies remained far behind the Federal Government as a whole.

---

[3] In February 1977, women comprised 40.2 percent of the national work force.

[4] In 1977, the lowest four grades ranged in starting salary from $5,810 (GS-1) to $8,316 (GS-4); starting salaries for the higher grades ranged from $33,789 (GS-15) to $54,410 (GS-18), although by law no pay rate could exceed $47,500, the rate set for Level V of the Executive Schedule. 5 U.S.C. §§ 5104, 5108.

[5] CSC, Federal Civilian Manpower Statistics, Employment of Women (1975).

[6] This was an average increase of .2 percent a year, a more rapid improvement than from 1970 to 1973 when female employment in these grade levels increased from 2.0 to 2.3 percent, an increase of .1 percent a year.

EXHIBIT 1-1

MINORITIES AND WOMEN AS A PERCENT OF THE WORK FORCE OF THE FEDERAL GOVERNMENT AND SELECTED AGENCIES

	Minorities		Women	
	1974	1976	1973	1975
Federal Government	17.0	17.7	34.0	35.3
National Aeronautics and Space Administration	5.3	8.1	18.2	19.3
Department of Transportation	8.9	12.2	16.7	17.6
Department of Agriculture	9.0	9.9	22.0	23.8

SOURCE: U.S. Civil Service Commission, Federal Civilian Employment of Women (1973, 1975); Minority Group Employment in the Federal Government (1974); Central Personnel Data File, Minority Group Employment (1976)

The Civil Service Commission describes the impact of Federal employment practices of past administrations as follows:

> Our studies and interviews lead us to the conclusion that past /Civil Service/ Commission policies and programs have created significant impediments to EEO. However, there have also been actions and policies, most notably in the area of upward mobility, which have had quite positive effects. Intensive and continuing studies on 140 occupations which represent about 85% of the competitive service seem to indicate
>
> - Small, but steady improvements in new hires of women and some minorities. Earlier progress by blacks now seems to be reversing.
> - Substantial progress for women and all minorities in promotions at the GS-4 through GS-7 levels.
> - Only isolated or token progress at the GS-9 through GS-15 levels.
> - Small increases in the super-grade levels.[7]

There has been no action with regard to the recommendation made by the Commission on Civil Rights that the President issue an Executive order directing the Civil Service Commission to change its operations to ensure that the Federal Government adheres to the same equal opportunity and affirmative action standards as are applicable to other employers. The responsibilities vested in the United States Civil Service Commission by statute and Executive order for assuring equal opportunity for minorities and women in Federal employment have not been changed since the Commission's report in 1975.

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[7] Memorandum from Jule Sugarman, Vice Chairman, Civil Service Commission, to Howard A. Glickstein, President's Reorganization Project, Office of Management and Budget, Sept. 1, 1977 /hereinafter referred to as Sugarman memorandum/.

- CSC continues to oversee and set standards governing the civilian personnel practices of the Federal Government.
- Under Title VII of the Civil Rights Act of 1964, as amended, which prohibits Federal agencies from discriminating against applicants or employees on the basis of race, color, religion, sex, or national origin, CSC is responsible for ensuring that Federal employment practices are nondiscriminatory and for reviewing annually agency affirmative action plans. 8/
- In addition, Executive Order 11478 directs CSC to enforce the requirements that Federal agencies maintain complaint procedures and use nondiscriminatory practices. 9/

II. Organization and Staffing

There have been no significant changes in the organizational structure of the Civil Service Commission since Volume V was issued. The structure described in that volume,and shown in Exhibit 1-2, is still current. The assignment of responsibilities to the various CSC bureaus and offices is generally the same as it was in 1974, although the Bureau of Personnel Management Evaluation no longer receives appeals to the Civil Service Commission from third party or general allegation complaints of employment discrimination. 10/

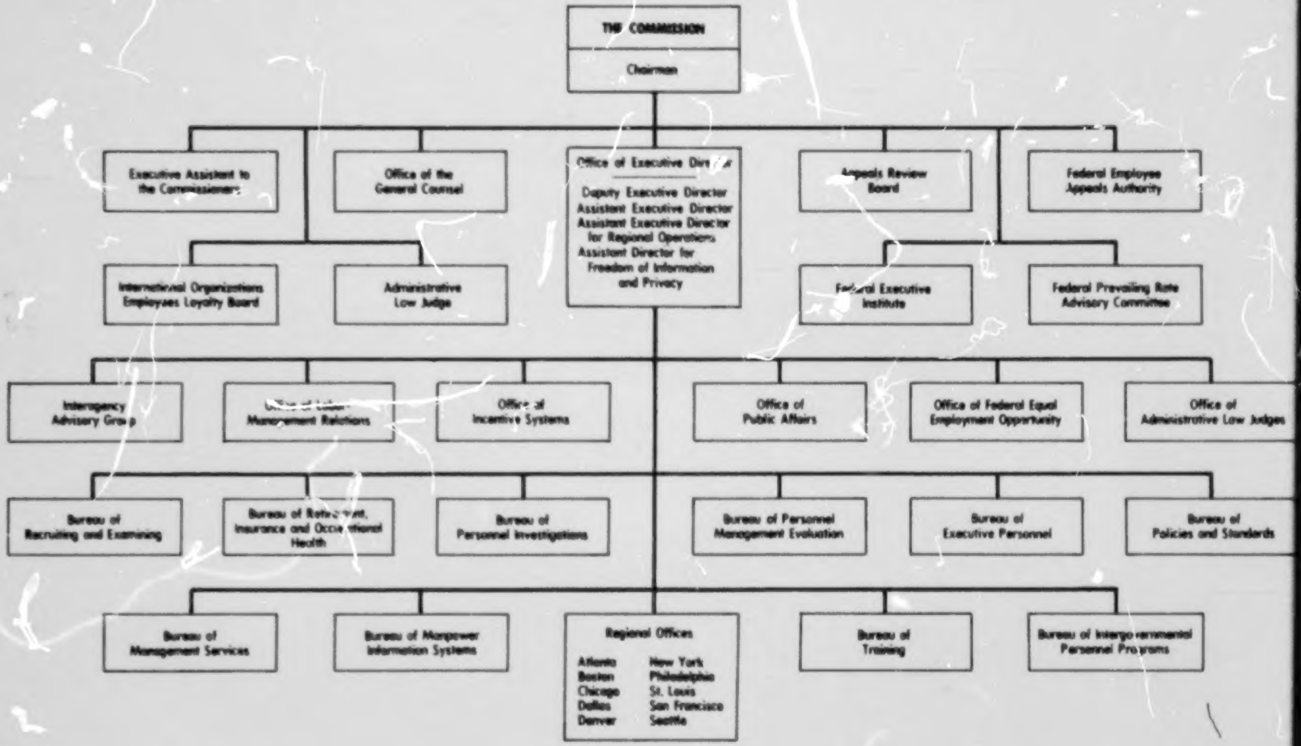
8/ 42 U.S.C. § 2000e(16).

9/ Exec. Order No. 11478, 3 C.F.R. 133 (1969).

10/ As is discussed in Section IV, Complaints, *infra*, CSC no longer provides a mechanism for the filing of third party allegations of discrimination.

Exhibit 1-2

UNITED STATES CIVIL SERVICE COMMISSION


THE COMMISSION
Chairman
Executive Assistant to the Commissioners
Office of the General Counsel
Office of Executive Director
Deputy Executive Director
Assistant Executive Director
Assistant Executive Director for Regional Operations
Assistant Director for Freedom of Information and Privacy
Appeals Review Board
Federal Employee Appeals Authority
International Organizations Employees Loyalty Board
Administrative Law Judge
Federal Executive Institute
Federal Prevailing Rate Advisory Committee
Interagency Advisory Group
Office of Labor Management Relations
Office of Incentive Systems
Office of Public Affairs
Office of Federal Equal Employment Opportunity
Office of Administrative Law Judges
Bureau of Recruiting and Examining
Bureau of Retirement, Insurance and Occupational Health
Bureau of Personnel Investigations
Bureau of Personnel Management Evaluation
Bureau of Executive Personnel
Bureau of Policies and Standards
Bureau of Management Services
Bureau of Manpower Information Systems
Regional Offices
Atlanta
Boston
Chicago
Dallas
Denver
New York
Philadelphia
St. Louis
San Francisco
Seattle
Bureau of Training
Bureau of Intergovernmental Personnel Programs

Source: Government Services Administration, National Archives Service, United States Government Manual 1977/1978, at 638.

In addition, there have been some minor changes which do not directly effect equal employment opportunities in the Federal Government. These include:

- The total size of the Commission's staff has increased from 6,500 in 1974 to 6,673 as of June 30, 1977.

- There has been an increase in the size of the Federal Employee Appeals Authority (FEAA) to assist it in carrying out responsibilities assigned in September 1974 to handle all appeals from adverse actions. 11/ Prior to that time complaints could be filed with the agencies themselves or with CSC. In 1974, FEAA had 131 employees, and as of June 30, 1977, it had 164 employees.

- There has been an increase in the size of the Bureau of Personnel Management Evaluation from 245 employees in 1974 to 280 as of June 30, 1977, to assist the Bureau to carry out a number of additional duties including enforcement of the Fair Labor Standards Act and increased participation in evaluating Federal agencies conduct of their own operations. 12/

- As of February 1977, the name of the Bureau of Executive Manpower was renamed the Bureau of Executive Personnel. The name change was to give the Bureau a sex-neutral name. No changes in responsibility were made.

11/ The responsibilities of FEAA are outlined in CSC, Federal Employee Appeals Authority, Appeals Procedures (January 1977).

12/ The Fair Labor Standards Act Amendments of 1974 extended coverage of the Act to Federal employees. 29 U.S.C. § 203(x) (Supp. V, 1975). None of the other offices discussed in Volume V were significantly larger or smaller than they had been in 1975. As of June 30, 1977, the Appeals Review Board had a staff of 46; Federal Equal Employment Opportunity had 35 employees; the Bureau of Policies and Standards had 246 employees; the Bureau of Recruiting and Examining had 139 employees; and the Bureau of Training had 264 employees. Campbell letter, supra note 1. None of these offices differed in size from 1975 by more than 10 percent. See Volume V, supra note 2, at 19-23.

The Civil Service Commissioners, all appointed in mid-1977, have expressed an active interest in equal employment opportunity (EEO) for Federal employees and have promoted the review of EEO policies and practices. The Commissioners, who have become involved in the day-to-day decisions of the Commission,[13] have indicated that Federal equal employment opportunity is one issue which will receive their personal consideration. They have expressed "great concern with the effectiveness of CSC's equal employment opportunity efforts."[14] In early September, they promised:

> At its next meeting the Commission will begin consideration of a new policy which would permit the use of excepted appointments on a limited basis for those occupations where a presumption of discrimination exists. A variety of different selection procedures would be used, each of which would involve competition and veterans preference. However, I expect that the use of these additional techniques will significantly enhance the capacity of agencies to improve their EEO posture.[15]

The Civil Service Commissioners have endorsed a policy of filling high level vacancies within CSC only after conducting strong affirmative recruitment for minorities and women, and in at least one Commission meeting, the Commissioners have discussed the employment practices of the Civil Service Commission itself.[16]

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[13] Interview with Jule Sugarman, Vice Chairman, CSC, July 15, 1977. For example, Commissioner Ersa Poston and Vice Chairman Jule Sugarman have assumed personal responsibility for supervision of affirmative action activities. Sugarman memorandum, supra note 7.

[14] Id.

[15] Id.

As of August 1977, the principal contribution to Federal equal employment opportunity of the newly appointed Civil Service Commissioners had been to help direct the Civil Service Commission toward the study of possible improvements. The Chairman has stated his willingness to examine closely the merit system as it operates, to determine how it is inhibiting the accomplishment of affirmative action goals.[17] The Vice Chairman is co-directing, along with the Assistant Director, Office of Management and Budget, the Federal Personnel Management Project, which is a major component of the President's executive branch reorganization effort. The project will examine personnel policies, processes, and organization to determine what improvements are needed. It will encompass nine areas, including equal employment opportunity.[18]

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[16] The Commissioners noted that representation of women and minorities at top level CSC positions was "disappointing and unacceptably low." Proposed Revised Commission Minutes, July 8, 1977, provided to Commission staff by Vice Chairman Jule Sugarman. CSC also stated:

> The Commission has changed, through officially adopting a policy, the ground rules for selecting all senior officials of the Commission by broadening the executive review board to include outsiders, women and minorities; by directing the readvertising of vacancies so that minorities and women would be aware of them, and by changing qualification requirements to broaden eligibility. Sugarman memorandum, supra note 7.

The four personal professional staff members appointed by the CSC Commissioners include two minority women and one minority male. Id.

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[17] CSC, Civil Service News (July 13, 1977). Chairman Alan K. Campbell stated:

> There is no conflict between affirmative action and merit; in fact, the two are supportive of each other and you can't have one without the other....The breakdown occurs, in my view, when one confuses the word merit with the trappings of merit. As one examines the merit system, one quickly understands that certain current practices, regulations, and laws, which in fact comprise the structure of our merit system are sometimes the very ones which simultaneously inhibit the accomplishment of affirmative action goals.... A mere look at the numbers is sufficient to illustrate that current selection procedures deny substantial talent to the Federal Government. *Id.* at 3, 5.

[18] The eight other areas, also referred to as "projects," are staffing; composition of the Federal work force; job evaluation; senior executive service; employee development; labor management relations; the role, function, and organization of personnel management; and Federal, State, and local relationships in personnel management. Several other areas will overlap with the equal employment opportunity project. For example, the project on executive service is considering veterans preference (see Section III, Recruiting and Examining, *infra*); the project on staffing will consider the application of Title VII to Federal employees; and the task force on work force composition will consider minority composition of the work force.

In the area of equal opportunity, the project will address itself to three objectives: the establishment of a talented Federal work force which is integrated at all levels of responsibilities and pay; the assurance that members of all groups have equal opportunity in Federal employment; and the guarantee through monitoring and evaluation that all employees will be treated fairly.[19] As of early August 1977, the project had not yet determined the specific equal opportunity issues it would address in depth.[20] It was scheduled to make its final recommendations in October.[21] As part of the fact-findings phase of the Federal Personnel Management Project, the Commissioners have traveled to CSC regional offices where they have met with Federal officials, including equal employment opportunity officers, employee groups, and community organizations to seek comments and observations for the project's consideration.[22]

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[19] Attachment to letter from Harriet G. Jenkins, Manager, Task Force 4, Federal Personnel Management Project, to Cynthia N. Graae, Director, Office of Federal Civil Rights Evaluation, Aug. 10, 1977.

[20] Telephone interview with Harriet G. Jenkins, Manager, Task Force 4, Federal Personnel Management Project, Aug. 9, 1977.

[21] Id.

[22] See, for example, letter from Thomas McCarthy, Seattle Regional Director, Civil Service Commission, to Joseph T. Brooks, Director, Northwestern Regional Office, U.S. Commission on Civil Rights, July 23, 1977. The Commissioners have met personally with over 500 equal employment opportunity leaders throughout the country. Sugarman memorandum, supra note 7.

III. Employee Selection

On November 23, 1976, CSC along with some other members of the Equal Employment Opportunity Coordinating Council adopted new guidelines for employee selection[23] which are a distinct improvement over its former guidelines.[24] The new guidelines:

- Require that each test user have available for inspection records which will disclose the impact of the selection procedures on minorities and women.[25]
- Recognize that lower test scores for one group, e.g., women, blacks, or Hispanics, which are not correlated with lower performance, may mean that use of the selection procedures unfairly deny opportunities to the group which receives lower scores.[26]
- Raise the standards for validating selection procedures, i.e., determining whether they are valid predictors of performance.

The new guidelines, however, are not as strong as those of the Equal Employment Opportunity Commission.[27]

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[23] 41 *Fed*. *Reg*. 51734 (1976).

[24] 37 *Fed*. *Reg*. 21552 (1972). The new guidelines are discussed more fully in Chapter VI *infra*, the Equal Employment Opportunity Coordinating Council.

[25] 41 *Fed*. *Reg*. 51734 (1976).

[26] 41 *Fed*. *Reg*. 51734 (1976).

[27] 29 C.F.R. § 1607 (1976).

In the summer of 1977, after new leadership had been appointed to both the Civil Service and Equal Employment Opportunity Commissions, officials from the two agencies discussed their respective employee selection guidelines in an effort to eliminate differences and develop uniform Federal agency selection guidelines. In early September CSC stated:

> The Vice Chairman of the Commission met /in early September/ with Chair Norton, Assistant Attorney General Days, Solicitor Clauss, and Assistant Secretary Elisburg to consider revisions in the selection guidelines. I am delighted to report that they believe they have achieved unanimous agreement as to guidelines which can be issued on behalf of all of those agencies. The material will, of course, have to go through the regular clearance processes and will ultimately have to be approved by the principals as members of the Equal Employment Opportunity Coordinating Council. Nevertheless, it appears that this most vexing and difficult problem is now solved and that another historic milestone in the civil rights battle has been passed. In view of that, the draft chapter becomes obsolete as a reflection of the state of events. 28/

28/ Letter from Alan K. Campbell, Chairman, CSC, to Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights, Sept. 6, 1977 /hereinafter referred to as September 1977 Campbell letter/.

As of early August 1977, the new CSC guidelines had had minimal impact on Federal selection procedures. CSC's principal accomplishments pursuant to the new guidelines had been to:

- Issue an instruction on bilingual and bicultural certification, encouraging Federal agencies to consider as a selection factor knowledge of a non-English language or culture, where such a qualification was needed for a Federal job. This instruction should be of assistance to Federal agencies in hiring Hispanics and other second language minorities. 29/
- Improve about 30 of the 150 "unassembled" examinations, rating schedules for evaluating written descriptions of experience submitted by applicants. 30/ These schedules had not been demonstrated by CSC to be valid predictors of job performance, pursuant to the new guidelines.

29/ CSC, Operations Memo No. 332 - 269 (Apr. 14, 1977).

30/ Telephone interview with John W. Fossum, Deputy Director, Bureau of Recruiting and Examination, July 21, 1977 /hereinafter referred to as Fossum telephone interview/. In July 1977, CSC wrote to this Commission that it was "proceeding to develop data collection procedures, and to apply appropriate validation strategy to both written tests and unassembled rating techniques." Campbell letter, *supra* note 2.

CSC had not taken steps to require Federal agencies to ensure that their selection procedures were valid predictors of job performance. It had not conducted a systemwide validation of its own selection procedures. CSC stated:

> Since the Guidelines introduce into the Federal personnel system significant new considerations and a body of technical criteria relating to the use of selection procedures, Governmentwide implementation of the Guidelines will require careful planning and substantial lead time. In its equal employment opportunity enforcement role, the Commission will evaluate the good faith efforts of agencies to come into compliance with the Guidelines and will develop a methodology to enforce these Guidelines. [31]

The Professional and Administrative Career Examination (PACE) may be a major barrier to Federal employment for minorities. The PACE serves as the chief means of entry into Federal employment for persons with college degrees or equivalent experience. It is used to screen applicants for more than 100 occupations, including such diverse positions as computer specialist, museum curator, and economist. It was developed to replace the Federal Service Entrance Examination (FSEE) which had been challenged on the grounds that it resulted in the rejection of a disproportionate number of minority applicants and had not been demonstrated to be an accurate predictor of job performance.[32]

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[31] Campbell letter, *supra* note 2.

[32] Douglas v. Hampton, 338 F. Supp. 18 (D.D.C. 1972), *aff'd in part, vacated in part*, 512 F.2d 976.

The PACE has been harshly criticized on the same grounds.[33/]

Although there are no statistics on the number of minorities who pass or fail the PACE,[34/] CSC data on new hires show that minorities represent only about 2.5 percent of the persons hired from the PACE register,[35/] only about .5 percent more than minorities hired from the FSEE register.[36/] Since minorities represent about 9.5 percent of the college graduates in this country,[37/] it appears that the test operates to exclude minorities.[38/]

[33/] Staff of Subcomm. on Equal Opportunities of House Comm. on Education and Labor, Report on Oversight Investigation of Federal Enforcement of Equal Employment Opportunity Laws, 94th Cong., 2d Sess., (1976) p. 56. /hereinafter referred to as Congressional oversight report/.

[34/] As noted in Section V, infra, CSC does not keep records on the racial or ethnic origin of applicants. Letter from Joseph W. Lowell, Jr., Assistant Executive Director, CSC, to Cynthia N. Graae, Acting Assistant Staff Director for Federal Evaluation, U.S. Commission on Civil Rights, June 7, 1976. CSC is, however, considering the possibility that in the future racial identification be standard on applications. Sugarman memorandum, supra note 7.

[35/] Interview with Jule Sugarman, Vice Chairman, CSC, July 15, 1977.

[36/] Fossum interview, supra note 30.

[37/] U.S. Department of Commerce, Bureau of the Census, Current Population Reports: Population Characteristics, Series P-20, No. 295 (June 1976). Since work experience equivalent to college graduation is an acceptable prerequisite to taking the PACE, undoubtedly the percent of minorities eligible to take the PACE is even higher than the percent they represent among college graduates.

[38/] Federal directors of personnel believe that it is the PACE and not factors which come into operation once the registers are compiled which operates to exclude both minorities and women. U.S. Civil Service Commission, Interagency Advisory Group, Fiscal Year 1976 Annual Report, at 17.

As of early August 1977, the PACE had not been adequately validated according to CSC's new guidelines[39/] to ensure that it was a good predictor of job performance. CSC had completed criterion-related validity studies of the PACE in only three agencies: (1) the Customs Service, Department of the Treasury; (2) the Internal Revenue Service, Department of the Treasury; and (3) the Social Security Administration, Department of Health, Education, and Welfare. The results of the validation studies, however, had not yet been compiled,[40/] and so it was not known if CSC found the test to be predictive of performance in those agencies.

[39/] CSC, FPM Letter No. 300-22, Jan. 19, 1977.

[40/] Telephone interview with Helen Christrup, Personnel Research and Development Center, CSC, Aug. 8, 1977.

In defense of the PACE, in July 1977 CSC provided this Commission with two reports[41] which revealed that the PACE has been the subject of intensive research, but provided no evidence that it has been properly validated.[42] Although it has been almost three years since the Civil Service Commission discontinued the FSEE, no significant improvement has been made toward validation of its replacement examination. CSC has no plans to revise or discontinue the PACE.[43]

There is independent evidence that the PACE is not the best predictor of performance in entry level professional positions. Employees who are hired from sources other than the PACE register often prove to be excellent employees. For example, the former Chairman of the Civil Service Commission stated that he believed that college students who have participated in the Cooperative Education Program, and thus can subsequently be hired as entry level professionals, often make better employees than those who are hired from the PACE register.[44]

The Cooperative Education Program provides for formally arranged scheduled periods of attendance at an institution of higher learning combined with periods of study-related work in a Federal agency under a

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41/ U.S. Civil Service Commission, The Professional and Administrative Career Examination: Research and Development (1977) and Normative and Administrative Career Examination (PACE): FY 1975. These reports were attached to the Campbell letter, *supra* note 2.

42/ See especially, CSC's discussion of the need for further research on the PACE. The Professional and Administrative Career Examination: Research and Development, *supra* note 41, at 30.

43/ Christrup interview, *supra* note 40.

44/ Interview with former Civil Service Commission Chairman Robert Hampton, July 25, 1977.

Schedule B appointment.[45/] Together, the work and study requirements for a bachelors degree provide necessary experience for noncompetitive conversion to a career-conditional or career appointment.[46/] Under the program, agencies set their own requirements for selection, such as proven writing skills or mathematical ability. There is no Government-wide test such as the PACE. The program as a whole illustrates that hiring of minorities can be substantially increased above the rate achieved under the PACE. In 1976, 27.1 percent of the conversions to career conditional or career appointments went to minorities, which is about 10 times the rate achieved through the PACE. If CSC had conducted a thorough analysis of Federal procedures for selecting employees, it might have learned what elements of the agencies' selection procedures for this program are effective in increasing minority hiring.

It must be noted, however, that despite its success in the hiring of minorities, the Cooperative Education Program needs closer scrutiny as to its impact upon minorities and women. On the basis of a sample survey the attrition rate of both minorities and women enrolled in the program appeared to be higher than for nonminority males. Even more signficantly, in 1976, women apparently

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[45/] CSC Bulletin No. 308-16 (Nov. 5, 1974). In 1976, there were 33 agencies participating in the program, employing over 9,000 students, who are in the program for 3 years. The students came from 538 colleges and universities, including those institutions with predominantly female and minority populations. CSC, Bureau of Recruiting and Examining, Federal Employment of Cooperative Education Students 1 (1976).

[46/] An employee is awarded a career conditional appointment when he or she is certified from a civil service register to a competition appointment in the Federal Government. Subsequently, an employee serving three years of substantially continuous service on a career conditional appointment is awarded a career appointment.

constituted only 17.6 percent of the participants in the program,[47] far lower than female representation in entry level professional positions.[48] It may well be that these disproportionate negative effects upon minorities and women arise from the use of invalid procedures at some stage in the selection process.

Current veterans preference rights and the "rule of three" both seriously impede the full implementation of Title VII for Federal employees. CSC is required to give additional points to veterans or their surviving spouses or mothers in ranking candidates according to their abilities to perform in positions tested for by competitive examination.[49] Since far more males than females are veterans, this provision for veterans preference has an extremely discriminatory effect upon the employment of women. Veterans who enter the Federal service also have special tenure rights for the duration of their Federal careers.[50] Thus, this provision for veterans preference negatively impacts upon women when there is a reduction-in-force.[51] As a result, the veterans preference provision has come under serious criticism by women's rights organizations[52] and this Commission.

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[47] Minorities constituted 33.9 percent and women, 22.4 percent of the students employed. However, of the number who converted to career conditional or career appointments, only 27.1 percent were minorities and 17.6 percent were women. These are conclusions of a CSC sample survey which covered seven Federal establishments and represented 62 percent of the students employed. It did not include the Department of Health, Education, and Welfare, which employs a high proportion of female students under the program. Memorandum from Arch S. Ramsay, Director, Bureau of Recruiting and Examining, to William R. Irvin, Director, Staffing Resources Division, CSC, "Survey--Minority and Female Participants as Cooperative Education Students in Federal Agencies--FY 1976," Apr. 28, 1977.

[48] In 1975, women constituted 40 percent of GS-5 through 7 professional positions. CSC, Federal Civilian Manpower Statistics: Employment of Women (1975).

[49] 5 U.S.C. § 2108, 3309, and 3313 (Supp. V, 1975). Some States also have veterans preference laws,although these laws vary considerably. See statement of Arch S. Ramsay, Director, Bureau of Recruiting and Examining, CSC, before the House Comm. on Post Office and Civil Service, on Veteran Preference in Federal Employment (May 1977).

In response, CSC, through the Personnel Management Project of the President's Reorganization Project,[53] has solicited views on several options for handling veterans preference, including:

- Continue present entitlements.
- Limit entitlement: for disabled persons only for a certain number of years, for hiring only, and/or for tenure only.
- Eliminate entitlement.[54]

Support for some modification of veterans preference has come from the present Civil Service Commissioners and from CSC officials.[55]

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[50] 5 U.S.C. §§ 2108, 3309, 3313.

[51] This problem is discussed in Volume V, *supra* note 2, at 30.

[52] Congressional oversight report, *supra* note 33, at 13.

[53] This project is discussed in Section II, Organization and Staffing, *supra*.

[54] President's Reorganization Project, Personnel Management Project, draft option paper, "Need for Executive Personnel System," August 1977.

CSC has stated:

> There is no doubt that the Commission's examination system has restricted progress where there was a willingness on the part of agencies to pursue affirmative action goals. It is also very clear that substantial elements of the Commission's examining program are dictated by the requirements of the Veteran's Preference Act. That Act has far more influence on examining policy than the Civil Service Act itself. As you know, the Commission will seek to modify that Act. There is no possibility that the Commission will ask, nor that the Congress would approve, repeal of the Veterans Preference Act. Therefore, and particularly in new hires, veterans preference will continue to restrain, in some degree, affirmative action efforts. 56/

CSC has testified before a congressional committee as to the advantages and disadvantages of veterans preference, but it has not recommended to Congress nor taken an official position as to how veterans preference should be modified.

Federal law prohibits hiring officials from considering any candidates other than the top three ranked individuals when hiring from outside the civil service.[57] This provision has been criticized by the General Accounting

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55/ U.S. Civil Service Commission, Civil Service News (July 13, 1977) and Sugarman interview, *supra* note 13.

56/ Sugarman memorandum, *supra* note 7.

57/ 5 U.S.C. § 3318.

Office[58] and this Commission. Available evidence indicates that CSC's ranking procedures are not reliable indicators of successful job performance and may, in fact, screen out qualified candidates.[59] The Civil Service Commission included this issue in its reorganization study,[60] and one option being considered by the reorganization study is to recommend changes in the law so that all eligible candidates could be considered for a position.

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[58] General Accounting Office, *Agencies Personnel Management Can Be Enhanced by Improving the Process* 13 (July 22, 1974).

[59] *Id.*

[60] Campbell letter, *supra* note 2.

IV. Processing Title VII Complaints

The most significant change in the processing of Federal employee complaints of discrimination since 1975 has been CSC's issuance of class action regulations in March 1977.[61/] In 1975, when complaints were made alleging discrimination against a class, the agency was not required to conduct an investigation; it was required only to establish a file and to notify the complainant of its decision, which the complainant could appeal to the Commission within 30 days. There were no time limits set for action.

In March 1977, CSC issued class action regulations in response to the December 1975 court order in Barrett v. United States Civil Service Commission,[62/] a delay of more than a year. The new regulations, while they are an improvement over the earlier absence of procedures, are deficient in a number of important respects. Among the major criticisms of the new regulations are the following:[63/]

[61/] CSC, FPM Letter No. 713-38, May 31, 1977. Class action complaints are discussed in Volume V, *supra* note 2, at 63.

[62/] Barrett v. U.S. Civil Service Commission, 44 L.W. 2280 (D.D.C., Order Dec. 10, 1975). The court ordered:

> ...consistent with their responsibilities under 41 U.S.C. § 2000e *et seq*. defendants [Civil Service Commission and National Aeronautics and Space Administration] must accept, process, and resolve complaints of class and systemic discrimination which are advanced through individual complaints of discrimination and must provide relief to the class when warranted by the particular circumstances of each class complaint...[and] defendant Civil Service Commission shall modify existing regulations and/or draft new regulations which will reflect its above declared responsibilities....

[63/] This Commission's position on CSC's class action regulations, first outlined in an attachment to letter from John A. Buggs, Staff Director, U.S. Commission on Civil Rights, to Anthony W. Hudson, Director, Office of Federal Equal Employment Opportunity, CSC, May 10, 1977, was most recently transmitted to CSC in an attachment to letter from Louis Nunez, Deputy Staff Director, U.S. Commission on Civil Rights, to Raymond Jacobson, Executive Director, CSC, May 17, 1977 /hereinafter referred to as Buggs and Nunez letters/.

1. The class action regulations do not provide for the processing of third party complaints. [64] Until April 17, 1977, appeals from third party complaints were processed by the Bureau of Personnel Management Evaluation. [65] However, after the issuance of the class action regulations, CSC instructed Federal agencies that "...new allegations of discrimination in Federal employment brought by third parties after April 17, 1977, will no longer be processed under formal administrative procedures." [66]

CSC views the class action regulations as obviating the need for a separate process for handling third party allegations of discrimination. [67] Apparently CSC believes that the class action complaint procedures provide adequately for the investigation of pattern and practices of discrimination. CSC stated:

> The class procedure now in place is specifically designed to permit adjudication of challenges to an allegedly discriminatory employment policy or practice. Therefore issues of systemic discrimination as well as individual actions are now a major element in the discrimination complaints system. [68]

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[64] As CSC defines them, third party complaints are allegations of discrimination in Federal employment "brought by groups of individuals not alleging discrimination against themselves and not seeking relief on their own behalf." CSC, FPM Letter 713-36, Apr. 18, 1977.

[65] Id. and Campbell letter, supra note 2. The Bureau of Personnel Management Evaluation is processing whatever complaints it received for review prior to the date of the new regulations. Campbell letter, supra note 2.

[66] CSC, FPM Letter 713-36, Apr. 18, 1977. Agencies were also instructed to make "reasonable efforts" to complete processing of third party complaints on hand as of April 17, 1977, within 180 calendar days of the date they were filed. Id.

[67] Id.

[68] Campbell letter, supra note 2.

One necessary condition for demonstrationg that discrimination affecting a group of persons has occurred is the willingness of the members of the group to participate in the complaint and to allege personal injury.[69] However, there is an increasingly large body of evidence that victims of institutional discrimination rarely file complaints about such discrimination.[70] There are, however, a large number of civil rights and employee interest organizations which have demonstrated an interest in assuring equal opportunity in the Federal Government and which monitor its activities in this area.[71] If third party complaints were permitted,these organizations could use the knowledge they have gained from their monitoring to file complaints on behalf of victims of institutional discrimination. By denying these organizations the right to file third party complaints, the Government is curtailing a valuable source of information and evaluation. Moreover, in the absence of a provision for filing third party complaints,CSC procedures afford less protection than the requirements of Title VII in the private sector, which provides third parties with a right to file complaints.[72]

69/ CSC, FPM letter 713-36, Apr. 18, 1977.

70/ This issue is discussed at length in a paper by David Copus, former Director, Special Investigation and Conciliation Division, Equal Employment Opportunity Commission, December 1977.

71/ These include the National Association for the Advancement of Colored People Legal Defense and Educational Fund, Inc. and the National Alliance of Postal and Federal Employees.

72/ 42 U.S.C. § 2000e-5(b) (Supp. V, 1975).

2. The new class action regulations unduly restrict the matters on which a class action may be based by excluding from their coverage challenges to CSC regulations. Section 713.601(a) of the class action regulations states:

> A "class" is a group of agency employees, former agency employees, and/or applicants for employment with the agency, on whose behalf it is alleged that they have been, are being, or may be adversely affected, *by an agency personnel management policy or practice which the agency has authority to rescind or modify*, and which discriminates against the group on the basis of their common race, color, religion, sex, national origin, and/or age. /Emphasis added/.

It is CSC's interpretation that the final regulations apply only to practices which the agency has the authority to change and not to employment practices established, administered, or required by the Civil Service Commission.[73] Thus, for example, the regulations would not permit challenges to the PACE or to unassembled examinations. Unless challenges to any discriminatory personnel action, whether taken on an agency's initiative or pursuant to CSC instructions or regulations, are permitted, the system allows the Civil Service Commission to be the final judge over its own practices and procedures. It appears to ignore the concern of

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[73] Interviews with James A. Scott, Acting Director, Office of Federal Equal Employment Opportunity, Civil Service Commission, July 20, 1977, and Carl F. Goodman, General Counsel, CSC, July 20, 1977.

Congress, in extending the protections of Title VII to Federal employees, that the rules and practices of the Civil Service Commission might be unlawful.[74]

3. The procedures for claiming relief under the new class action regulations are unduly burdensome to the claimant. As this Commission has noted, they are time consuming and they conflict with judicially prescribed standards and procedures under Title VII.[75]

These procedures state that after discrimination is found, a claimant:

- Must file a claim with the head of the discriminatory agency for relief.
- Must make a showing of individual damage in accordance with the "but for" rule (but for the discrimination, the claimant would have obtained the job or promotion).
- Must show in specific detail that he or she is a class member who was affected by a personnel action or matter resulting from the discriminatory policy.
- May be required to attend further hearings and submit evidence at the discretion of the complaints examiner.
- May appeal the agency's decision to the Civil Service Commission's Appeals Review Board or file a civil action only after having been twice denied relief.

The Commission on Civil Rights has informed CSC that it believes the procedures for claiming relief should be totally rewritten to conform with

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[74] Subcomm. on Labor of the Comm. on Labor and Public Welfare, 92d Cong., 2d Sess., Legislative History of the Equal Employment Opportunity Act of 1972 (H.R. 1746) Amending Title VII of the Civil Rights Act of 1964, 421-23 (Comm. Print 1972). It may also ignore the intent of the court in Barrett (*supra* note 62) which ordered the development of the class action regulations. The former Assistant Executive Director, CSC, stated that he believed that the intent of the holding in Barrett (see note 62) was that challenges to CSC were permissible. Telephone interview with Irving Kator, former Asst. Exec. Dir., CSC, Aug. 11, 1977. Mr. Kator is now in private practice.

[75] Buggs and Nunez letters, *supra* note 63.

Title VII standards and procedures.[76] In the Commission's view, once a finding of class or systemic discrimination has been made and a class member files a claim for individual relief, the legal burden shifts; if the agency wishes to challenge the claimed relief it should be required to demonstrate that the individual: (a) was not affected by the discrimination or (b) is entitled to lesser relief than that claimed.

4. There have been other criticisms of the class action regulations as well.[77] These include:

- The hearing examiner's decision is not binding on the discriminatory agency.
- Settlement of a class action complaint is binding on all class members.
- Precomplaint counseling, which is not suitable for class complaints and prevents the filing of a complaint for at least 21 days, is required.[78]

Apart from the issuance of the class action regulations, there have been no major changes in CSC's regulations, guidelines, and handbook for complaint processing. The guidelines, which were in draft form when Volume V was being written, have been finalized.[79] The major deficiencies of CSC's procedures, many of which were noted by this Commission in 1975, remain largely the same.[80] They include:

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[76] *Id.*

[77] These criticisms, as well as the ones discussed earlier, are among the criticisms raised by: the Leadership Conference on Civil Rights, the NAACP Legal Defense and Educational Fund, Inc., the National Alliance of Postal and Federal Employees, the Washington Lawyers Committee for Civil Rights Under Law, and the Urban Law Institute of Antioch School of Law. Not all criticisms were raised by all of these organizations.

[78] These issues are discussed in Buggs and Nunez letters, *supra* note 63.

[79] CSC, *Investigating Complaints of Discrimination in Federal Employment* (Revised March 1975).

- CSC regulations set more stringent requirements for filing complaints than is required by Title VII.
- CSC guidelines do not include a full definition of the meaning of discrimination, failing to make clear that facially neutral practices which have a disparate effect can be discriminatory.
- CSC guidelines generally limit the scope of the investigation to actions and decisions of the allegedly discriminatory agency official and to the organizational segment in which the complaint occurred.
- The investigator, in reviewing the complainant's file and determining what matters to investigate, is directed to consider only those issues which were considered by the counselor.[81]
- The guidelines for investigating individual complaints[82] do not fill the gap created by the inadequacies in the class action regulations. The guidelines do not emphasize surveying the agencies' general environment for discriminatory patterns or practices.[83] The General Accounting Office found that neither the Commission nor nine agencies reviewed by GAO had made any major attempt or achieved progress in identifying the system's discriminatory practices.[84]

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[80] These deficiencies are discussed in Volume V, supra note 2, at Chapter IV.

[81] GAO determined that counselor reports were at times poorly prepared and late and that there were deficiencies in the performance of part-time counselors. General Accounting Office, System for Processing Individual Equal Employment Opportunity Discrimination Complaints. Improvements Needed 17 (Apr. 8, 1977) /hereinafter referred to as GAO report/.

[82] Id.

[83] Id. at 44.

[84] Id.

- The director of EEO has the discretion to terminate an investigation before it is completed.[85] In agencies where the director is an employee in the personnel office, this power may create a conflict of interest, especially on complaints related to personnel actions.

- CSC procedures are not adequate for informing applicants how to file a complaint, if they believe that they have been discriminated against in the selection process. Few applicants are aware that if they claim that discrimination was caused by CSC procedures they can file an appeal directly with the Appeals Review Board.[86]

As of July 1977, CSC was developing a training module for use by the Commission's Equal Employment Opportunity Training Institute in training investigators Government-wide.[87] CSC also expected "to establish a procedure which will require Commission training and/or certification of agency employees who conduct investigations of discrimination complaints."[88] CSC also noted that:

> An updated Examiner's Handbook which will provide detailed guidance on the conduct of hearings on class complaints is being prepared. This handbook will incorporate principles for the evaluation of

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[85] CSC, Investigating Complaints of Discrimination in Federal Employment 28 (1975).

[86] Interview with Herman Staiman, Chairman, Appeals Review Board, July 20, 1977.

[87] Campbell letter, *supra* note 2.

[88] *Id.*

> evidence established in significant Title VII cases and will describe a standard of shifting burdens of proof which will be applied by complaints examiners in drafting recommended decisions in discrimination cases. In the interim, the Federal Employee Appeals Authority has been provided information regarding case law on burden of proof.[89]

However, as of July 1977, CSC regulations and guidelines also did not require that investigators receive training in identifying and documenting employment discrimination. The guidelines for investigators state that investigators should "be familiar" with the "basic goals" of "the civil rights and equal employment movements,"[90] but they set no standards for training or the substantive knowledge of equal employment law which investigators should have. The guidelines further state that investigators should "be familiar" with Federal personnel procedures.[91] The General Accounting Office reports, however, that EEO officials lack the ability to deal effectively with systemic discrimination because in most instances they are not knowledgeable of personnel management and lack the necessary training.[92] The situation is further exacerbated by the lack of communication between EEO officials and the personnel office.[93]

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[89] Id.

[90] Id. at 4.

[91] Id.

[92] GAO report, supra note 81, at 16.

[93] Id. at 44.

The number of employment discrimination complaints filed with Federal agencies each year is increasing. In fiscal year 1976,[94] 38,812 persons were counseled, an increase of more than 20 percent since 1974;[95] 7,018 formal complaints were filed, more than twice the number filed in fiscal year 1974.[96] Allegations of racial discrimination continued to be the most frequent, followed, as in 1974, by allegations on the basis of sex, national origin, and religion. More than 35 percent of all complaints concerned promotions. Other matters giving rise to complaints, in the order of their frequency, included: separations, appointments, suspensions, reassignments, and reprimands.

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[94] Fiscal year 1976 was 15 months long, including a 3-month transition quarter which enabled the starting date for fiscal years to be changed from July 1 to October 1. The data in this chapter for fiscal year 1976 do not include the transition quarter, July 1, 1976, through September 30, 1976. CSC also commented:

> In FY 1975 the Civil Service Commission conducted 172 discrimination complaint investigations in response to agency requests for reimbursable investigative services. This figure increased to 559 in FY 1976. An additional 138 requests for investigative services were accepted during the transition quarter. In addition to this substantial effort to assist agencies in handling complaint workloads, the Commission has exercised its authority to assume jurisdiction over the processing of discrimination complaints by taking over (from agencies) for investigation 362 complaints in FY 1976 and 92 during the transition quarter, as compared with 38 in FY 1975.
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> Thus, during FY 1976, the Commission conducted 921 investigations of discrimination complaints which constituted 24.5% of all investigations conducted Governmentwide during FY 1976. During the transition quarter the Commission conducted a total of 230 investigations including requests and take-overs. Campbell letter, supra note 2.

[95] In fiscal year 1974, 31,484 persons were counseled. Memorandum from Joseph Canedo, Chief Complaints Division, Office of Federal Equal Employment Opportunity, CSC, to Franklin Taylor, Equal Opportunity Specialist, U.S. Commission on Civil Rights, undated. Contact with an equal opportunity counselor is the first step in filing a complaint for an employee or applicant who believes he or she has been discriminated against.

[96] In fiscal year 1974, 3,435 formal complaints were filed. Id.

The time for processing Federal employee complaints of discrimination has almost doubled, from 201 days in fiscal year 1974 to 398 days in fiscal year 1976. Although CSC regulations provide that Federal agencies must investigate, hold hearings, and render a final decision on a complaint within 180 days of its receipt,[97] CSC reported that in fiscal year 1976 only 3 of 47 major Federal agencies had an average complaint processing time of less than 180 days.

The Appeals Review Board (ARB) reverses only a few decisions of Federal agencies. In fiscal year 1976, 1,760 agency decisions which were adverse to Federal employees were appealed to ARB, more than a 100 percent increase since 1974. ARB's backlog of cases has increased correspondingly, from 506 cases at the end of fiscal year 1975 to 1,164 cases at the end of fiscal year 1976.[98] The majority of cases in ARB's backlog had been held in ARB for more than 180 days.[99]

97/ 5 C.F.R. § 713.220(a) (1976).

98/ CSC, *Appeals Review Board Annual Report to the Commissioners for Fiscal Year 1976* /hereinafter referred to as ARB Annual Report/, at 9.

99/ Staiman interview, *supra* note 86. Complainants may commence legal action 180 days after they appeal their complaint to ARB.

As in the past, ARB generally has upheld agency decisions which were adverse to Federal employees.[100] In fiscal year 1976, decisions were upheld 75 percent of the time (760 cases). In that year, ARB rejected almost 3 percent of the appeals (26 cases) and remanded 15 percent (149 cases) to the agencies for further processing. It reversed agency rejection of complaints and findings of discrimination in only 7 percent (73 cases) of the decisions it rendered.[101]

When ARB decisions were appealed to CSC Commissioners, the Commissioners were also supportive of agency decisions. In fiscal year 1976, a total of 65 ARB equal employment opportunity decisions were appealed to the CSC Commissioners. Fifty-six of these reviews were requested by individuals and nine by agencies. The Commissioners reopened 6 cases and denied the request for reopening in the other 59 cases. Two of the 6 cases reopened were requested by agencies and 4 were requested by individuals. Only one reopened case, which had been appealed by an agency, was reversed.[102]

As of July 1977, criticisms which this Commission made in 1975 concerning appeals to the Appeals Review Board remained the same.[103]

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[100] For a discussion of ARB's past performance see Volume V, supra note 2, at 82.

[101] ARB Annual Report, supra note 98, at 9.

[102] Letter from Robert B. Bates, Assistant to the Commissioners (Appeals), CSC to James Morris, Equal Opportunity Specialist, Office of Federal Civil Rights Evaluation, U.S. Commission on Civil Rights, July 25, 1977.

[103] Information on the Appeals Review Board in 1977 came from interview with Carl Goodman, General Counsel, CSC, July 20, 1977, and Staiman interview, supra note 99.

These criticisms include:

- In arriving at its decisions, the ARB does not follow Title VII case law or precedents.

- ARB is not bound by the legal opinions of CSC's Office of General Counsel.

- ARB does not maintain a liaison with the Office of Federal Equal Employment Opportunity.[104]

- ARB does not observe stare-decisis with respect to its own opinions.

- ARB's review of cases is confined to only those materials contained in the case file.

CSC is aware that the appeals procedure may have weaknesses. In September 1977, it stated:

> Discrimination appeals, and appeals in general, are the subject of intense scrutiny by the Federal Personnel Management Project. The Commission has not taken a position on this matter, but it is clear that as individuals we are willing to:
>
> 1. Consider a broader use of arbitration.
>
> 2. Consider removing the adjudicatory function from the Commission.
>
> 3. Consolidate multiple appeals systems into a single or smaller number of systems.
>
> 4. Consider methods for speeding decisions, reducing frivolous complaints, and duplicating appeals of the same action.[105]

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[104] ARB is informed of changes or modifications in CSC policy, including equal employment opportunity matters, by the office of CSC's Assistant Executive Director. Staiman interview, supra note 99.

[105] Sugarman memorandum, supra note 7.

V. Reviewing Affirmative Action Plans

In April 1976 CSC revised its affirmative action instructions for Federal agencies.[106] When the revised guidelines were issued, CSC stated that they were an attempt to identify and solve problems, eliminate nonessential paper work, and remedy any remaining plan inadequacies.[107] The guidelines contain three major areas for the focus of affirmative action plans:

- A thorough assessment of any conditions which may impede the realization of equal employment opportunity;
- A clear identification of problems surfaced as a result of the assessment; and
- The development of realistic objectives and of actions designed to solve the problems and attain the objectives.[108]

The new guidelines continue to be substantially weaker than the requirements placed on Federal contractors under Revised Order No. 4,[109] a problem which has not been remedied by even further revisions of the guidelines for 1978.[110]

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[106] CSC, FPM Letter No. 713-35, Apr. 30, 1976.

[107] Campbell letter, *supra* note 2.

[108] See CSC, FPM Letter No. 713-40, Aug. 17, 1977. The major change introduced by these guidelines is the deletion of some of the requirements for an analysis of complaint handling. CSC noted that:

> Also, agencies are required by Commission instructions to report annually on the accomplishment of actions and objectives planned previously. These accomplishment reports are reviewed in the Commission, along with statistical indicators of change and the findings of onsite evaluations of agency programs, to assess overall program effectiveness and identify needs for specific guidance and direction to agency management. Campbell letter, *supra* note 2.

[109] 41 C.F.R. § 60-2 (1974). For a discussion of the requirements of Revised Order No. 4 see *Volume V*, *supra* note 2, at 88, 89.

The major differences continued to be:

- CSC's revised affirmative action guidelines permit but do not require agencies to develop goals and timetables.

- CSC does not require sufficient detail in the job groupings. CSC refined its earlier requirement that work force data be broken down by major job categories, such as professional and technical. The new guidelines require that work force data be broken down by job series, which is a substantial improvement. However, there are some series which encompass several types of jobs, such as the clerical series which includes clerks, personal secretaries, and stenographers. Adherence to the new guidelines would not reveal differentials between jobs within series.

- The guidelines for 1977 do not clearly require that work force data be cross-tabulated by sex, although this deficiency will be partially corrected by further instructions of affirmative action for 1978.[111]

- CSC does not require agencies to report or maintain data on the number of minorities and women participating in upward mobility and training programs, the number recruited and the number hired and promoted by grade level. CSC has considered developing a form for reporting this information, but decided that it would not be worth the estimated cost of $300,000.[112]

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[110] CSC, FPM Letter No. 713-40, Aug. 17, 1977.

[111] CSC informed this Commission that:

> Under the newer /1978/ EEO plan guidelines, agencies are required to conduct a work force analysis by sex within each minority group at each grade level for each pay system used, and in each major occupational series. Agencies are required to cross-tabulate work force data by minority group and sex. Campbell letter, supra note 2.

[112] Telephone interview with Alexander Haddon, Chief, Affirmative Action and Upward Mobility Section, Office of Federal Equal Employment Opportunity, CSC, July 26, 1977.

In September 1977, CSC described its own observations on Federal affirmative action efforts and its commitment to make improvements.

> The (Civil Service) Commission requires agencies to submit affirmative action plans. It approves those plans, but does little to enforce them. It is the consensus of informed persons that this system is not working. The Commission intends to change that.
>
> The directions of change have not been fully worked out, but our thinking at this time included action to:
>
> 1. Involve our staff in the formulation of agency plans so that we may adapt our staffing requirements in support of agency EEO plans.
> 2. Require on the scene monitoring of agency action under the plan.
> 3. Authorize racially identifying material on applications.
> 4. Press vigorously for training of EEO officials and for involving them in management decisions.
> 5. Continue emphasis on and support of upward mobility programs.
> 6. Issue standards for EEO personnel and make it possible for them to transfer into other management positions.
> 7. Hold accountable and, if necessary, discipline those who discriminate or who fail to take required affirmative actions. 113/

113/ Sugarman memorandum, *supra* note 7.

CSC has made available to Federal agencies some statistical information for their use in assessing the representativeness of their work forces. CSC has furnished its regional offices with very general employment data from the Bureau of the Census, broken down by race, ethnic origin, and sex for major metropolitan areas in the United States.[114] The regional offices in turn are to supply these data to Federal agencies. In addition, CSC has instructed its regional offices to provide Federal agencies with more detailed information on local areas on an as-needed basis.[115]

CSC has also provided agencies with a memorandum showing the percentage of male and female blacks, Hispanics, Asian Americans, and Native Americans and the number of nonminority females in each employment series in General Schedule occupations. These figures summarize data for all agencies. They are not broken down by grade level.

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[114] For a discussion of the inappropriateness of using only Census data for assessing work force representativeness see Volume V, *supra* note 2, at 94.

[115] Haddon interview, *supra* note 112.

The CSC guidelines for affirmative action plans require an analysis of supervisory positions when data on supervisory positions "becomes available." The CSC official in charge of developing these data stated, however, that he does not think it would be useful to require supervisory data from agencies and that CSC is not preparing these data.[116]

In order to assist Federal agencies assess whether minorities and women are adequately represented in their work forces, CSC has calculated a "representative employment range" for each job code.[117] The range extends from 25 percent above to 25 percent below the percentage of all Federal employees in each code who are black, Hispanic, Asian American, Native American, and women.[118] If agencies' employment of minorities or women falls outside the range, they are encouraged to correct the problem. Among the deficiencies of this system are the following:

- The figure of 25 percent is arbitrary and CSC does not provide any rational basis for its use.
- The effect of the 25 percent figure varies, depending upon the percent of minorities or women represented in an occupational code, but at all levels of representation it binds

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[116] / *Id*.

[117] / Memorandum from Anthony W. Hudson, Director, Office of Federal Equal Employment Opportunity, CSC, to Directors of EEO and Personnel, EEO Plan Assessment, Area No. 3-Recruiting, Nov. 5, 1976.

[118] / Thus, for example, if blacks comprised 10 percent of a given job code, the representative range would extend from 7.5 percent to 12.5 percent. If blacks comprised 50 percent of the job code, the representative range would extend from 37.5 percent to 62.5 percent. The greater the representation of a group, the wider the representative employment range.

the Federal Government to its own deficiencies in minority and female hiring. [119]

- The lists are not prepared by grade level, and thus do not assist agencies in identifying the widespread problem of underrepresentation of minorities and women at higher grade levels.

CSC has reduced the number of agencies which must develop and submit affirmative action plans. In 1976, all agencies with more than 100 employees nationwide were required to develop complete affirmative action plans.[120] As of August 1977, agencies with fewer than 500 employees nationwide were required only to maintain an abbrievated plan consisting primarily of a policy statement on equal employment opportunity.[121]

Many affirmative action plans are not submitted to CSC on time. In fiscal year 1977, the Civil Service Commission was scheduled to review a total of 930 affirmative action plans--154 national and 776 regional plans.[122] The submission dates were negotiated individually with the agencies, but in no case were later than October 1, 1976, for national plans and April 1, 1977,

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119/ The poorer the Government's record in hiring minorities or women, the smaller and lower the "representative employment range" will be; the greater the concentration of minorities or women, the broader and higher the "representative range" will be. The CSC system provides no encouragement for affirmative recruitment of males in jobs such as secretary or clerk-typist where 99 percent of the incumbents are women.

120/ Memorandum from Anthony W. Hudson, Director, Office of Federal Equal Employment Opportunity, CSC, to Directors of Personnel and Directors of EEO, June 7, 1976.

121/ CSC, FPM Letter 713-40, Aug. 17, 1977.

122/ According to CSC, approximately 1800 additional plans are developed but not routinely submitted to CSC for review.

for regional plans. As of late July 1977, almost four months after regional plans were due, only 753 plans (81 percent) had been approved. Fourteen plans had been disapproved and not yet rewritten; another 53 required modification, although CSC did not consider the modifications serious enough to reject the plans; 84 were under review by CSC; another 26, including one national plan,[123] had not yet been submitted.[124]

CSC had not taken effective action against agencies which fail to comply with its instructions for affirmative action plans.[125] A review of monthly status reports from CSC's regional offices from January through mid-July 1977 revealed that 40 agency or installation plans from six regions[126] had been disapproved because they were not officially acceptable to CSC.

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[123] This plan was the one due from the Department of Health, Education, and Welfare.

[124] Campbell letter, *supra* note 2.

[125] Haddon interview, *supra* note 89. CSC officials have suggested the following possible actions if agencies fail to comply with its guidelines; but they have not been adopted by CSC:

- Issuances of press releases.
- Publication of notices in the *Federal Register*.
- Requests to the Comptroller General to terminate the salaries of Federal officials who fail to comply with lawful CSC requests.

[126] The six regions were Chicago, Denver, New York, Philadelphia, St. Louis, and Seattle.

However, in 1976 telephone calls from the Assistant Executive Director and letters from the Civil Service Commission to heads of agencies and departments were not productive in securing compliance from the agencies which had not completed acceptable plans.[127]

CSC along with this Commission and other members of the Equal Employment Opportunity Coordinating Council (EEOC) signed a policy statement on affirmative action in State and local government.[128] However, the Civil Service Commission has not endorsed the position of the Commission on Civil Rights that the equal employment and affirmative action guidelines applicable to private employers and State and local government employers under Title VII of the 1964 Civil Rights Act and under Executive Order 11246 must be followed by the Federal Government as minimum standards for complying with the mandate of the Congress that employment discrimination in the civil service be eliminated.

The Civil Service Commission has stated that it believes that the fact that both the CSC and this Commission were signatories to the EEOCC policy statement indicates that any fundamental philosophical disagreement between the two agencies' concepts of affirmative action is obsolete.[129]

127/ Kator telephone interview, *supra* note 73.

128/ 41 Fed. Reg. 38814 (1976). This affirmative action policy statement is discussed further in Chapter VI, The Equal Employment Opportunity Coorinating Council *infra*.

129/ Campbell letter, *supra* note 2.

Indeed, the statement demonstrates important areas of agreement, especially concerning the acceptability, when past discrimination has been shown, of making race, ethnic origin, or sex a factor in selecting names from a list of qualified applicants for a vacancy. However, the agreement does not, in and of itself, resolve all differences between CSC and this Commission concerning affirmative action in Federal employment. First, the policy applies specifically to State and local governments and not to Federal employment. Second, it is not a comprehensive description of requirements placed upon employers who underutilize minorities and women, but rather an agreement as to some permissible steps to overcome the effects of past discrimination. It does not address this Commission's concern that CSC has not agreed that Title VII standards, which are applicable to private and State and local government employees, are equally applicable to Federal employment.[130]

An August 1977 review of 12 national affirmative action plans[131] approved by CSC revealed that some improvements have been made, especially with regard to the use of some form of job grouping in their work force analyses. However, many of the kinds of failures to comply with CSC instructions which this Commission identified in 1975 continued to appear in Federal agency plans. For example:

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[130] This statement is discussed in detail in Chapter VI, infra.

[131] In August 1977, staff of the Commission on Civil Rights reviewed plans of the Departments of Agriculture (USDA), Housing and Urban Development (HUD), Interior (USDI), Justice (DOJ), Transportation (DOT), and the Treasury; the Civil Service Commission (CSC), Equal Employment Opportunity Commission (EEOC), Forest Service (FS), General Services Administration (GSA), Internal Revenue Service (IRS), and the National Aeronautics and Space Administration (NASA). To assist the reader in evaluating the information in the text, the following is the list of these agencies alphabetized by the abbreviations used to identify them: CSC, DOJ, DOT, EEOC, FS, GSA, HUD, IRS, NASA, Treasury, USDA, USDI.

- Nine agencies failed to break down their work forces analyses by major organizational segment. (CSC, DOJ, DOT, EEOC, GSA, HUD, IRS, NASA, USDA).
- Two agencies failed to conduct their analyses by grade level (DOJ and DOT) and five others clustered the grade levels they used in their analyses (HUD, IRS, NASA, Treasury, and USDI).
- Four agencies failed to compare the status of women and minorities within their work forces with availability in the work force (DOJ, EEOC, GSA, USDI) and six others used only Civil Service Commission data on Federal employment as a point of comparison (DOT, FS, IRS, NASA, Treasury, USDA).
- Seven agencies failed to estimate job openings (CSC, DOJ, EEOC, HUD, IRS, Treasury, USDI).
- Three agencies failed to use CSC's standardized report form to record their accomplishments (DOT, Treasury, USDI).

Although none of the twelve plans fully complied with CSC's instructions for affirmative action, all of them were approved. Only four of the twelve letters of approval from CSC contained any reference to deficiencies in the agencies' affirmative action plans.[132/]

[132/] CSC noted deficiencies in its letters to DOT, GSA, NASA, and USDA.

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VI. Evaluating Agencies' Compliance

The responsibility for conducting reviews of agencies' personnel systems continues to be assigned to the Bureau of Personnel Management Evaluation (BMPE) and Personnel Management Evaluation Divisions within the regional offices. As part of these evaluations, BPME and the regional staffs are responsible for determining whether agencies are adhering to nondiscriminatory practices and to their affirmative action plans.

As of July 1977, CSC evaluations took more than twice the amount of time and cost more than twice as much as they did in 1974. In 1977 general reviews[133] required approximately 116 person days and cost about $13,800; special reviews[134] required approximately 33 days and cost about $4,700.[135]

CSC officials attributed the increase in time and cost to two factors: 1) as of 1977, CSC reviewed agency internal evaluation systems along with their personnel practices and 2) in 1977, CSC did considerable evaluation of information on hand prior to its onsite investigations to determine the nature of agency problems.[136]

CSC budget allocation for its evaluations program did not increase proportionally to the increase in time required for evaluations.[137] In fiscal year 1977, and again in fiscal year 1978, the Commission allocated $7.4 million for evaluation, an increase of only about one-third since 1974. As a result, CSC is able to conduct even fewer reviews than it conducted in 1974 when it reviewed fewer than 15 percent of the estimated 4,000 Federal agency installations which fall within the Bureau's responsibility to review. During fiscal year 1976, it conducted only 89 general reviews and 204 special reviews. It projected a workload during fiscal year 1977 of 110 general reviews and 250 special reviews. It also performed 102 reviews of agency's internal personnel management evaluation systems and participated in 145 agency-led evaluations.[137]

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[133] These are onsite reviews of agency personnel practices and programs.

[134] These are inquiries focusing on specific areas of personnel management, such as labor relations or equal employment opportunity.

[135] In 1974, general reviews required 54 person days and cost $6,320 while special reviews required approximately 16 person days and cost $2,220. Campbell letter, *supra* note 2.

[136] Telephone interview with Raymond D' Antonia, Agency Officer, Bureau of Personnal Management Evaluation, CSC, Aug. 10, 1977.

[137] In addition, BPME has been assigned responsibility for ensuring compliance with the Fair Labor Standards Act, which was amended in 1974 to include Federal employees. 29 U.S.C. § 203(x) (Supp. v, 1975).

By 1977 CSC had increased emphasis on agency development of internal personnel management evaluation systems, but had not provided agencies with specific instructions for conducting an equal employment opportunity review. CSC's instruction to agencies for conducting their own reviews describes what is required by an evaluation system--for example, that it collect information, result in reports that are useful to management, and provide for follow-up.[138] CSC anticipates that it will apply additional resources to its goal of enhancing the effectiveness of agencies' self evaluations through "a systematic participation in and surveillance of agencies' internal evaluations."[139] CSC has not issued guidelines as to what should be evaluated or what methods of evaluation should be used. A CSC official informed Commission staff that "what matters" is whether or not an agency has a system of internal evaluation and not how the evaluations are conducted.[140]

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[137] Campbell letter, supra note 2.

[138] CSC, FPM Letter Supp. 273-73, Instruction 6 (May 1976).

[139] Campbell letter, supra note 2.

[140] D'Antonia interview, supra note 136.

CSC believes that its increased emphasis on agency internal evaluations will improve cost effectiveness and increase CSC's own impact, but in the area of equal employment opportunity, its belief appears to be unfounded. Federal agencies are already required to conduct evaluations of their efforts to practice equal employment opportunity in connection with their affirmative action plans. It seems unreasonable to expect that the mere instruction to conduct yet a further evaluation will produce any more insightful self-analysis than is contained in the affirmative action plans.[141] Even if more comprehensive instructions for equal employment opportunity self-audits were developed in connection with internal evaluation process, it would probably be more effective to incorporate those instructions into the guidelines for affirmative action plans, rather than to ask agencies to produce a second evaluation document. Further, if an agency repeatedly shows an underutilization or exclusion of certain minority groups or women in one or more of its subunits, occupations, or grade levels, additional management and personnel expertise through Civil Service Commission evaluations may be necessary to identify obstacles to equal employment opportunity.

Although CSC's new guidelines on employee selection procedures were[142] adopted in November 1976, as of July 1977, CSC had not issued instructions to its evaluators for assessing compliance with those guidelines. Indeed, just as they had in 1974, CSC's instructions to evaluators in 1977:

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[141] The requirements for affirmative action plans are discussed in Section V, *supra*.

[142] 41 *Fed*. *Reg*. 51752 (Nov. 23, 1976).

- Failed to require that evaluators investigate the validity of the rating standards used in personnel actions.
- Failed to require that all qualification standards utilized by an agency be investigated to determine if they have any adverse effects on excluded or underrepresented groups.

CSC reported that "In its equal employment opportunity enforcement role, the Civil Service Commission will evaluate the good faith efforts of agencies to come into compliance with guidelines /on employee selection procedures/ and will develop a methodology to enforce those guidelines."[143]

Between 1975 and 1977, there were several supplementary instructions to CSC's guideline on evaluation,[144] but as of July 1977, the basic deficiencies in this guideline remained the same as in 1974. The evaluation guidelines still:

- Did not require systematic investigation to identify employment practices which may have an illegally discriminatory effect.
- Did not require investigation of the causes of any underutilization or exclusion of minorities and women uncovered in an evaluation.
- Did not require that investigators look for patterns of consistently assigning women or minorities to positions below their level of skill and ability.

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[143] Campbell letter, *supra* note 2.

[144] CSC, FPM Letter Supp. 273-73, Instructions 6 (May 1976) through 11 (April 1977).

- Prohibited evaluators from recommending what goals should be adopted by an agency to remedy underutilization of minorities and women.

In connection with its evaluation program, CSC has greatly improved its capability for analyzing racial, ethnic, and sex data on personnel actions. CSC reported that in October 1975 the Bureau of Personnel Management Evaluation installed an "automated information retrieval system" for use in the evaluation process.[145/] This system has the capability to "sort and cross-tabulate data by race, ethnicity, and sex and all other variables found in the /Civil Service/ Commission's Central Personnel Data file."[146/] Thus, it "features over 65 standard reports, most of which display a particular type of personnel activity sorted by its impact on the variables of sex or race."[147/] The personnel activity reflected in those reports includes promotions and new hires, by grade level and occupational series. CSC has informed this Commission that data from the new information system was released to CSC evaluators for use in 13 reviews in fiscal year 1977.[148/]

Between May 1974 and June 1977, CSC conducted surveys of employee attitudes toward opportunities for minorities and women in seven installations, bringing to 42 the total of installations surveyed on attitudes.

[145/] Campbell letter, *supra* note 2.

[146/] *Id*.

[147/] *Id*.

[148/] *Id*.

The aggregated results for the 42 installations showed that minority and female employees 1) continued to report less satisfaction with promotion opportunities and their jobs than did nonminority males and 2) more frequently perceived that women and minorities were treated unfairly than did nonminority males.[149] Moreover, comparing the results in 35 surveys completed by May 1974 with all 42 surveys, it appears that the disparities between the perceptions of women and minorities, on the one hand, and nonminorities, on the other, are increasing.[150]

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[149] Id.

[150] Survey results as of 1977 were as follows. The numbers in parentheses indicate the survey results in 1974:

Survey results showed that 45 (50) percent of males, 46 (51) percent of nonminorities, 56 (56) percent of females, and 60 (57) percent of minorities were not satisfied with opportunities for promotion. Dissatisfaction with their jobs was indicated by 21 (18) percent of males, 20 (18) percent of nonminorities, 29 (23) percent of females, and 36 (31) percent of minorities. When asked whether they felt minority employees were treated better, the same as, or worse than nonminorities, 7 (2) percent of males, 3 (3) percent of nonminorities, 12 (8) percent of females, and 29 (21) percent of minorities responded "worse." Six (4) percent of males, 13 (9) percent of nonminorities, 18 (19) percent of minorities, and 27 (13) percent of females responded that females received worse treatment than males.

Under a new policy, CSC makes its evaluation reports available to the public. CSC wrote to this Commission:[151]

> Following the ruling in Vaughn v. Rosen that certain portions of BPME reports must be made available, the Commission developed a new policy on the release of CSC evaluation reports. A copy of all CSC evaluation reports issued since July 1, 1976, is available for review by Federal employees (or any citizen for that matter) in Commission regional offices and in the Commission's central office library. Further, copies of any CSC evaluation report issued prior to July 1, 1976, are available from the issuing office on an individual request basis. Any Federal employee will be supplied upon request with information from a CSC evaluation report that pertains to that employee. Thus, Commission evaluations of EEO efforts, regardless of agency or installation, are now open to public scrutiny which lends further impact to our findings and the corrective actions which we require in implementing this public policy.

Randomly selected CSC evaluation reports prepared during 1976 and 1977 reflected inadequate attention to the impact of agency practices upon minorities and women. A review of six evaluation reports[152] written during these two years revealed that CSC was aware of the following types of problems:

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[151] Campbell letter, supra note 2.

[152] These evaluations were of: Department of the Interior, August 1976 (general review); General Accounting Office, Chicago Region, January 1977 (review of position management, position classification, and equal employment opportunity); U.S. Customs Service, Department of the Treasury, Boston Region, January - February 1977 (general review); Department of Commerce, February 1977 (equal employment opportunity portion of a general review); General Services Administration, April 1977 (equal employment opportunity portion of a general review); and Yellowstone National Park, April 1977 (follow-up evaluation).

- Responsibilities for specific EEO activities were not assigned; EEO counselors were not trained; personnel specialists were not familiar with affirmative action plans.[153]
- The EEO program was loosely administered, suffering from a lack of policy direction and guidance from top management; the transmittal of the affirmative action plan (AAP) was the only policy issuance to managers pertaining to EEO; the AAP was very vague and general with no goals, objectives, or specific actions.[154]

However, several serious problems appeared to have been overlooked or considered only on a superficial basis. For example, "overgrading," i.e., employees receiving higher rank and pay than their duties warrant, was noted in one report with no indication of whether the evaluator had determined if there was any violation of Title VII or the Equal Pay Act. In addition, there could have been a violation of Title VII, for example, if the overgraded positions had been disproportionately held by one sex or racial or ethnic group while members of another group were doing the equivalent work for less pay. The same report also noted that the efforts to provide training in the installation were not sufficiently systematic, but the evaluator had apparently not attempted to learn whether this situation resulted in reduced training opportunities for minorities or women.[155]

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[153] The problems were noted in the GSA evaluation.

[154] These problems were noted in the review of the Department of Commerce.

[155] These problems were noted in the U.S. Customs Service review.

Two evaluations failed to provide separate data for blacks, Hispanics, Native Americans, and Asian Americans, and thus where underutilization was especially severe for one group, this problem was not noted.[156] One evaluation report provided no work force data although it was a follow-up to a 1977 evaluation which showed that minorities and women were poorly represented in the work force.[157] Recommendations were not always made for remedying the problems found, and thus although CSC commented in a section entitled "Personnel Management Achievements" that "The biggest area of need is the Spanish-speaking program, where affirmative action has not yet occurred to any significant extent...." CSC did not suggest what the agency should do to remedy the problems.[158]

156/ In both cases, the installations reviewed had an underutilization of Hispanics. One evaluation was that of the Department of Commerce. In the Bureau of the Census at the Department of Commerce, there was, at the time of CSC's review, no Hispanic above the GS-14 level but this was not noted in the review. The other evaluation was of the U.S. Custom Service. It noted lack of affirmative action for Hispanics but did not measure the extent of their underutilization.

157/ This was the evaluation report of Yellowstone National Park.

158/ This was the evaluation of the U.S. Customs Service.

VII. Correspondence between the Civil Service Commission and the Commission on Civil Rights

In September 1977, the Civil Service Commission Chairman wrote to the Chairman of this Commission:

> This has reference to the August 19, 1977, letter from Mr. John Buggs which transmitted draft chapters on the Civil Service Commission, and on the Equal Employment Opportunity Coordinating Council, for inclusion in an updated version of your 1975 report, "To Eliminate Employment Discrimination."
>
> I find it somewhat difficult to respond to this request because we are in a period of intense activity, which in my view is significantly altering the status of EEO and affirmative action activities in the Federal government.
>
> ...I think you might be interested in the attached memorandum. It describes in capsule form some of the initiatives that are being taken by the new Commissioners; initiatives which we believe are going to lead to a very substantial change in the government's affirmative action posture.
>
> ...my basic view is that the value of the revised chapter has now been reduced because of the rapid developments which are occuring in the civil rights community generally and in the Civil Service Commission specifically. I have no specific suggestion as to what you might do as a result of this, but I would hope that you at least personally are aware of this changing climate and changing program of action.159/

159/ September 1977 Campbell letter, *supra* note 28.

For several months during mid-1977 there has been, as the Civil Service Commission observed, "a period of intense activity" in all Federal agencies with major responsibilities for enforcing Federal equal employment opportunity law, including the Departments of Labor and Justice and the Equal Employment Opportunity and Civil Service Commissions. The Civil Service Commission has participated as a joint sponsor with the Office of Management and Budget in the Federal Personnel Management Project, which is making recommendations to the President for reorganization of the Federal personnel system.[160] On September 7, 1977, the Project circulated a lengthy paper presenting options in six major areas which affect the inclusion of minorities and women in the Federal workforce, options which could provide possible solutions for many of the problems identified by the Commission on Civil Rights in such areas as affirmative action, complaint handling, and evaluation.

In addition, the project has circulated option papers on Federal personnel management and the composition of the Federal work force, which have implications for equal employment opportunity in the Federal work force.

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[160] Federal Personnel Management Project, Option Paper Number One, Equal Employment Opportunity and Affirmative Action; staffing; Appeals and Performance Evaluation (Sept. 7, 1977).

We are hopeful that consideration of the options presented in these papers will result in improvements in the Federal Civil Service. However, we disagree with the Civil Service Commission's conclusion that the many recent developments in the area of equal employment opportunity negate the value of this chapter. First, as of late September 1977, most of the recent developments were plans and not actions. Second, the purpose of this report is not to evaluate the equal employment activities of the past two months, but rather to evaluate the equal employment activities of Federal agencies over the past two years--from the period between July 1975 through July 1977. To the extent that the agencies we have reviewed have provided us with more up-to-date information and with their plans, we have attempted to incorporate that material as well.

Chapter 2

DEPARTMENT OF LABOR (DOL)

OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS (OFCCP)

Introduction

In July 1975, this Commission noted a number of serious deficiencies in the Government's contract compliance program. These deficiencies, which were discussed in *The Federal Civil Rights Enforcement Effort--1974, Vol. V, To Eliminate Employment Discrimination* frequently stemmed from lack of firm leadership.

The following chapter evaluates the activities of the Office of Federal Contract Compliance Programs from July 1975 through August 1977. It shows that many of the earlier deficiencies have continued into mid-1977. However, Department of Labor officials appointed in 1977, including the Assistant Secretary for Employment Standards and the Director of the Office of Federal Contract Compliance Programs, are aware of the shortcomings of the contract compliance program and are taking steps to eliminate them through changes in regulations and organization.

The position of the OFCCP Director has been upgraded within the Department of Labor. In addition, as of October 1, 1977, the number of compliance agencies has been decreased, which should improve OFCCP's control over the contract compliance program and reduce duplication of effort.

The Department of Labor has recently issued proposed regulations setting goals for women in the construction industry. It has also issued regulations which would unify affirmative action requirements for construction contractors. It has taken steps, along with the Department of Justice, the Civil Service Commission, and the Equal Employment Opportunity Commission, to reconcile interagency differences in guidelines for employee selection procedures.

Further, the Department of Labor recognizes that there are still other areas in which improvement is needed. With the support of the Secretary, a task force was established to make recommendations for strengthening the contract compliance program. The task force's report, which was issued in late September 1977, recommends drastic revisions in the OFCCP data collection system, the establishment of clear standards for remedying discrimination, the strengthening of affirmative action requirements, and the adoption of more efficient compliance review mechanisms. It recommends the creation of a separate contract compliance administration within the Department of Labor and the consolidation of all Federal contract compliance activities within that administration.

It is too early to assess the impact of the Department's recent activities on behalf of the Federal contract compliance effort. However, the fact that these activities are occurring is in itself a meaningful step forward.

I. Regulations

A. Regulations which became effective on February 17, 1977

On February 17, 1977, revisions in OFCCP's rules became effective[1] which affected OFCCP's rules on the obligations of contractors and subcontractors (Part 60-1); affirmative action programs (Part 60-2); and administrative proceedings (Part 60-30). The most significant of these changes are discussed below.[2]

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[1] 42 Fed. Reg. 3454 (Jan. 18, 1977). The procedures for administrative proceedings became effective on the day of publication in the Federal Register; all other parts became effective Feb. 17, 1977. In a letter to this Commission, DOL explained that "The January 18, 1977, rulemaking amended the current regulations incorporating enforcement procedures already in use, codifying existing practices and extending coverage." Attachment to letter from Donald Elisburg, Assistant Secretary for Employment Standards, U.S. Department of Labor, to Honorable Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights, Sept. 9, 1977 /hereinafter referred to as Sept. 9, 1977, Elisburg letter/.

In August 1977, a draft of this chapter was sent to the Department of Labor for review. Included in the Department of Labor's response was the following comment:

> The remarks dwell at length on the controversial rules and regulations and other actions or omissions which occurred prior to the installation of new leadership over the Federal Government in general and over the Department of Labor and OFCCP in particular. While some focus on matters emanating from the prior leadership is understandable, it would appear that, in each instance where feasible the report should elaborate to an appropriate degree on the views of the Secretary of Labor, the Assistant Secretary for Employment Standards Administration (ESA), and the Director, OFCCP with respect to those developments. Otherwise, the report might create the erroneous impression that the Department of Labor, ESA or OFCCP endorses those prior events. For example, on several occasions the Secretary of Labor has publicly expressed the view that coverage of the Executive Order's requirement should be broadened, not reduced. Letter from Donald Elisburg, Assistant Secretary for Employment Standards, Department of Labor, to Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights, Sept. 6, 1977 /hereinafter referred to as Sept. 6, 1977, Elisburg letter/.

To the extent that Mr. Elisburg provided additional information about the views and actions of the current Department of Labor leadership, the information has been incorporated in this chapter.

OFCCP has broadened the coverage of affirmative action plans[3] by increasing the number of categories of contractors which must develop them. Prior to February 17, 1977, affirmative action plans were required of any contractor or subcontractor with 50 or more employees and a contract of $50,000 or more.[4] This requirement did not extend to many members of the freight shipping industry[5] because, although freight shippers often held hundreds of thousands of dollars of Federal contracts in the form of bills of lading,[6] the size of each transaction was generally small enough to be exempt from the affirmative action requirement. On February 17, 1977, OFCCP extended the affirmative action requirement beyond the $50,000 minimum to include all freight shipping companies with 50 or more employees holding Government bills of lading which in any 12-month period total or can reasonably be expected to total $50,000 or more.[7]

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[2] During the past 2 years, no amendments have been made in the following: Part 60-20, Sex Discrimination Guidelines; Part 60-40, Examination and Copying of OFCCP Documents; Part 60-50, Guidelines on Discrimination Because of Religion or National Origin. For an analysis of these guidelines, see The Federal Civil Rights Enforcement Effort--1974, Vol. V, To Eliminate Employment Discrimination (July 1975) /hereinafter referred to as Volume V/.

[3] **The requirements for the contents of affirmative action plans remain the same and are described in** Volume V, supra note 2, at 236.

[4] 41 C.F.R. § 60-2.1 (1975).

[5] The freight shipping industry includes air, water, and surface transportation industries.

[6] A bill of lading is the written record of a contract for the shipment of goods listing the goods shipped, the owner of the goods, terms of the shipment, and destination. The bill of lading is signed by the authorized agent of the common carrier acknowledging receipt of the goods and promising to deliver them safely to their destination.

[7] 42 Fed. Reg. 3461 § 60-2.1 (Jan. 18, 1977) (to be codified at 41 C.F.R. § 60-2.1 (a)). OFCCP reports that this change is consistent with recent case law. 42 Fed. Reg. 3454 (Jan. 18, 1977). Castillo v. Usery, U.S.D.C. N.D. Cal., Civ. No. 73-202 AJZ.

In addition, the affirmative action requirement was extended to:

- Contracts and subcontracts with depositories of Federal funds in any amount.
- Contracts and subcontracts with financial institutions which are issuing or paying agents for U.S. savings bonds and notes in any amount. [8]

OFCCP reported that these changes were made in order to bring OFCCP regulations into conformity with the practices of the Department of the Treasury, the compliance agency responsible for the banking industry.[9] Thus, presumably, these changes will not significantly increase the written affirmative action requirements currently placed upon financial institutions. The Department of the Treasury estimates that only about 3,400 of the 22,000 such institutions (15 percent) in this country have 50 or more employees.[10]

OFCCP has broadened the coverage of the equal opportunity clause by increasing the categories of contracts to which it applies. Nonetheless, there continue to be a number of exemptions from the clause.

8/ 42 Fed. Reg. 3461 (Jan. 18, 1977) (to be codified at 41 C.F.R. § 60-2.1 (a)).

9/ 42 Fed. Reg. 3457 (Jan. 18, 1977). DOL further explained:

> While the January 18, 1977 amendments specifically incorporated in the /Code of Federal Regulations/ the /affirmative action program/ requirements for financial institutions and depositories, these institutions were already obligated to comply; therefore, the effect of the amendments was to codify the requirements not to extend them. Sept. 9, 1977, Elisburg letter, supra note 1.

10/ Telephone interview with Joseph Sargent, Chief, Program Systems Division, Office of Contract Compliance, Department of the Treasury, Aug. 19, 1977.

The Executive order requires each Federal agency to include an equal opportunity clause in its contractual agreements with contractors. The clause binds contractors to two basic contractual commitments: (1) not to discriminate in employment on the basis of race, color, sex, religion, or national origin, and (2) to undertake affirmative action to ensure that equal employment opportunity principles are followed in personnel practices at all company facilities, including those facilities not engaged in work on a Federal contract. As discussed in Volume V, a number of categories of contractors have been exempt from the clause.11/ As of February 17, 1977, OFCCP eliminated the exemption for contractors who have no single contract of $10,000 or more, if they hold contracts totaling $10,000 a year.12/

However, there continue to be other exemptions in OFCCP's regulations which cannot be fully justified. For example:

11/ Some of these exemptions are listed in Volume V, supra note 2, at 235.

12/ The Department of Labor explained in the introduction to the revised rules that:

> ...Upon consideration of the matter we have concluded that the burden of complying with the equal opportunity clause (as opposed, for instance, to meeting affirmative action program-type reporting requirements) is not so substantial that it should not be shouldered by all contractors doing more than $10,000 worth of business with the Government. 42 Fed. Reg. 3454 (Jan. 18, 1977).

- Contracts of less than $10,000 are exempt if they are held by contractors who do less than $10,000 worth of business a year with the Federal Government.

- Where there is a contract with a State or local government, those subunits of government which do not work on the contract, are exempt. In contrast, all facilities of a private employer who contracts with the Government are covered.

- Contracts for work performed outside the United States by employees who were not recruited within the United States are exempt. This exemption is broader than a similar one in Title VII of the Civil Rights Act of 1964 which exempts employers from the provisions of that title only with respect to aliens employed outside the United States and not with regard to United States citizens. 13/

- Religiously-oriented educational institutions are permitted to limit hiring to persons who are of the same religion as the institution's orientation, even if religion is not a legitimate qualification for all positions in such an institution. 14/

OFCCP has adopted uniform procedures for all administrative enforcement of Executive Order No. 11246. The new procedures 15/ commendably introduce uniformity into the process of administrative hearings. They require that hearings be held by an administrative law judge, and they apply both to

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13/ Title VII exempts employers from the requirements of that title only with regard to aliens outside the United States. 42 U.S.C. § 2000e-1 (Supp. V, 1975). This issue is discussed more fully in letter from John A. Buggs, Staff Director, U.S. Commission on Civil Rights, to Lawrence Z. Lorber, Director, Office of Federal Contract Compliance Programs, Department of Labor, Dec. 27, 1976.

14/ At least one United States court of appeals has indicated that the first and fifth amendments to the Constitution probably prohibit religious institutions from practicing religious discrimination with respect to their secular activities. Kings Garden, Inc. v. FCC, 498 F.2d 51 (D.C. Cir. 1974), cert. denied, 419 U.S. 996 (1974).

15/ 42 Fed. Reg. 3462 § 60-30 (Jan. 18, 1977) (to be codified at 41 C.F.R. § 60-30).

OFCCP and to compliance agencies.[16] Previously, procedures for hearings were not uniform and could be established by the Secretary of Labor or the head of any compliance agency.[17]

A major weakness of the new administrative enforcement procedures is that they do not require cancellation of contracts or debarment immediately following a hearing at which Executive order violations are demonstrated. Under the new rules, if the Secretary of Labor concludes that a contractor has violated the Executive order, the equal opportunity clause, or the regulations, an Administrative Order shall be issued. The Administrative Order may be limited to directing the contractor to discontinue all violations and to comply with Executive Order No. 11246.[18]

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[16] *Id*.

[17] 41 C.F.R. § 60-1.26 (1975). This provision was superseded effective Feb. 17, 1977 by a new § 60-1.26. 42 *Fed*. *Reg*. 3460 (Jan. 18, 1977).

[18] The regulations state that the order must be issued "enjoining the violations, and requiring the contractor to provide whatever remedies are appropriate and imposing whatever sanctions are appropriate, or any of the above." 42 *Fed*. *Reg*. 3467 (Jan. 18, 1977) (to be codified at 41 C.F.R. § 60-30.30).

The regulations do not require immediate contract cancellation at this point. Thus, a noncomplying contractor, who throughout the investigation and conciliation phase of the compliance process has been asked repeatedly to comply with the Executive order,[19] may face no penalty for having failed to comply until after the hearing.

The procedures require "the immediate cancellation, termination, and suspension of the respondent's contracts and/or debarment of the respondent from further contracts,"[20] only if the respondent fails to comply with an Administrative Order[21] issued after the hearing. However, the procedures contain no methods or time frames for determining--after the Administrative Order has been issued--whether the contractor ultimately complies.

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[19] Once a contractor has been found in violation of the Executive Order, the compliance officer must attempt conciliation. If conciliation fails, the compliance officer must issue a 30-day show cause notice. If after the 30 days a contractor still does not comply and conciliation has failed, the compliance officer, with the approval of the Director, may institute enforcement proceedings. However, after the Director receives a compliance officer's request for enforcement, the rules provide no time frames for the Director's approval. Therefore, once a compliance agency makes a request for enforcement, OFCCP can delay the matter indefinitely without violating the regulations. 42 Fed. Reg. 3460 § 60-1.26 (Jan. 18, 1977)(to be codified at 41 C.F.R. § 60-1.26).

[20] 42 Fed. Reg. 3467 § 60-30.30(a) (Jan. 18, 1977) (to be codified at 41 C.F.R. § 60-30.30(a)).

[21] Id.

The procedures leave unanswered such questions as whether another compliance review must be conducted to determine if the contractor has complied and, if so, within what time frame; what standards will be used in assessing compliance with the order; and whether the contractor is entitled to another hearing if it asserts that compliance has been achieved in the face of obvious evidence to the contrary. DOL, too, recognizes that there are weaknesses in the enforcement procedures. It stated:

> OFCCP recognizes the weaknesses in the administrative enforcement procedures. There is a need to speed up the process so that potential inequities in the procedures are eliminated. Under the current system contractors who are in violation of the Order can still be considered awardable. The OFCCP task force report contains specific recommendations for dealing with this dilemma. 22/

22/ Sept. 9, 1977, Elisburg letter, supra note 1. The task force report is discussed in Section II, infra.

The new rules may make it easier for contractors to continue receiving Federal contracts after they have been declared "nonresponsible."[23/] Contractors not in compliance with the Executive order can be found nonresponsible and passed over, i.e. denied contracts, twice without a hearing.[24/] However, DOL has stated: "The issue of passing over contractors who are in violation of the Order raises serious legal questions. Courts on numerous occasions have said that the passover constitutes de facto debarment and requires a hearing."[25/] This view is reflected in the new rules which provide that a contractor who has been declared nonresponsible may request the Director of OFCCP to determine that there are substantial issues of law or fact

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23/ OFCCP regulations require that when it is found, either through a complaint or a compliance review, that a contractor does not have an affirmative action program at each establishment, or has substantially deviated from an approved affirmative action program, or has failed to develop or implement an affirmative action program which complies with the regulations, the contracting officer must declare the contractor/bidder nonresponsible. 42 Fed. Reg. 3462 § 60-2.2(b) (Jan. 18, 1977) (to be codified at 41 C.F.R. § 60-2.2(b)).

24/ The regulations state: "...When the contractor/bidder is declared nonresponsible more than once for inability to comply...the compliance agency shall promptly send to the Director a written request that enforcement proceedings be initiated pursuant to § 60-1.26...." 41 C.F.R. § 60-2.2(b) (1976).

25/ Sept. 9, 1977, Elisburg letter, supra note 1.

raised by the contractor's nonresponsibility.[26] If the Director concurs, the contractor continues to be eligible for Government contracts until a hearing or judicial proceeding has been completed. The former rules permitted the Director of OFCCP to make such a determination and postpone a declaration of ineligibility, but did not suggest that the contractor could request such a determination.[27]

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[26] 42 Fed. Reg. 3462 § 60-2.2(b) (Jan. 18, 1977) (to be codified at 41 C.F.R. § 60-2.2(b)).

[27] 41 C.F.R. § 60-2.2(b) (1976). DOL responded:

> The authority of the Director of OFCCP to make determinations on substantial issues of law and fact existed prior to the January 18, 1977, amendments. These amendments codified established procedures. The distinction noted by the report, that contractors did not have the expressed authority to request such determinations, is irrelevant. Contractor requests have traditionally been the way that these determinations were initiated. Sept. 9, 1977, Elisburg letter, supra note 1.

This provision could permit contractors who were in defiance of the Executive order to be eligible for further Federal contracts. On the basis of this Commission's single experience with the predecessor provision, it would appear that there is likelihood of such use. According to material in Commission files, in February 1976, the Department of the Interior issued a show cause notice to Uniroyal, Inc. because of its continuing practice of sex discrimination in its Mishawaka, Indiana, plant. The show cause notice would have made Uniroyal ineligible for additional Federal contracts, but Uniroyal subsequently requested the OFCCP Director to determine the existence of substantial issues of law, and the Director, with no discussion, complied.[28] The National Urban League too, has expressed concern over this provision, stating:

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[28] For further discussion of this case see, Alta Chrapliwi, et al v. Uniroyal, Inc., et al., Civil No. 72 S 243 (D. Ind., filed July 5, 1973), order for partial summary judgment; Alta Chrapliwi, et al. v. Uniroyal, Inc., et al., Civil No. 72 S 243 (D. Ind., filed July 16, 1973), defendant motion to alter order of July 5, 1973; Alta Chrapliwi, et al v. Uniroyal, Inc., et al., Civil No. 72 S 243 (D. Ind., filed Feb. 27, 1974), motion denied [the court noted as one basis for the denial, the defendant's "further admission that it refused to consider female employees for assignment, transfer or promotion to jobs restricted to male employees, regardless of seniority or qualification." Id.]; and letter from Alfred R. Gordon, Manager, Eastern Region, Department of the Interior, to David Beretta, President and Chairman of the Board, Uniroyal, Inc., Feb. 26, 1976. On August 5, 1977, the Department of Labor announced its intention to initiate debarment procedures against Uniroyal. DOL, News, Aug. 5, 1977.

> The OFCCP Director should not have such a power. The compliance agency has been delegated its responsibility and the OFCCP Director should not be allowed to overturn the findings of the compliance agency.... [T]he term "significant issues of law or fact" has little meaning since issues of fact can usually be found in any dispute. Such loose legal jargon should not be the basis of overturning the results of a carefully done investigation by compliance personnel. 29/

OFCCP's revised rules provide new procedures for complaint handling, permitting the referral of individual allegations of discrimination to district offices of the Equal Employment Opportunity Commission (EEOC). This provision should enable OFCCP and the compliance agencies to devote more of their resources to combating systemic discrimination. In response to this provision when it was proposed in the Federal Register, 30/ Commission on Civil Rights staff noted:

> [W]e recommend that complaints against contractors who are scheduled to be the subject of compliance reviews should be investigated and resolved in conjunction with the scheduled compliance reviews.... All complaints not investigated in connection with compliance reviews should be referred to EEOC.... 31/

29/ Testimony of Ronald H. Brown, Deputy Executive Director, National Urban League, Inc., at hearings on the Office of Federal Contract Compliance Programs Proposed Non-Construction Regulations before the House Subcomm. on Equal Opportunities of the House Comm. on Education and Labor, Nov. 10, 1976, at 9.

30/ 41 Fed. Reg. 40352 §60-1.30(c)(2) (Sept. 17, 1976).

31/ Buggs letter, supra note 13, at 20.

The new rules also specify that class complaints [32] should be referred to the appropriate compliance agency. The compliance agency is instructed to complete the investigation and forward the determination to the complainant and OFCCP. However, few compliance agencies notify OFCCP of their determinations. There is almost no follow-up of these referrals, either. According to an OFCCP staff member, this is because there were only two staff members assigned to the complaint processing function.[33]

Complainants may appeal the compliance agency's findings to OFCCP. In this case, the compliance agency is requested to send the case file. This file is then sent to the compliance division responsible for the compliance agency. The compliance division informs the complainant and compliance agency of OFCCP's determination.

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[32] A third group of complaints, those over which OFCCP has no jurisdiction are, where possible, referred to other Federal agencies appropriately. OFCCP informs the complainant of its lack of jurisdiction and of the agency to which the complaint has been referred.

[33] Telephone interview with Glorietta Gaston, Administrative Officer, Management Support Staff, OFCCP, July 19, 1977.

For calendar year 1976, OFCCP received a total of 3,039 complaints. In addition, there were 506 complaints outstanding at the end of calendar year 1975. OFCCP referred 787 complaints to EEOC--596 Executive order complaints and 191 Title VII complaints. Of the remaining 2,756 complaints, OFCCP referred 293 to the compliance agencies, 126 to the OFCCP compliance divisions for disposition, and 225 to other agencies (no jurisdiction). In addition, 1,608 were responded to directly by OFCCP staff. As of December 31, 1976, 504 complaints had not yet been processed.[34]

B. Other Regulations

In November 1976, OFCCP adopted new guidelines[35] on employment selection criteria which are weaker than its earlier guidelines and those of the Equal Employment Opportunity Commission (EEOC). In 1975, the Department of Labor commented that it did not believe that the distinction between its own guidelines and those of EEOC was substantial.[36] However, in 1976, DOL and EEOC, as members of the Equal Employment Opportunity Coordinating Council, were unable to agree on uniform employee selection guidelines. EEOC ultimately chose to retain its existing guidelines, while on November 23, 1976, OFCCP adopted new guidelines. These guidelines, commonly referred to as the Federal Executive Agency Guidelines, were also agreed upon by the Department of Justice and the Civil Service

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[34] Telephone interview with Glorietta Gaston, Administrative Officer, Management Support Staff, OFCCP, DOL, Aug. 22, 1977.

[35] OFCCP guidelines were published in 41 Fed. Reg. 51744 (Nov. 23, 1976) (to be codified at 41 C.F.R. § 60-3). EEOC's guidelines can be found at 29 C.F.R. § 1607.1 *et seq*.

[36] *Volume V*, *supra* note 2, at 246.

Commission. They are weaker than EEOC's guidelines on a number of points.[37]

With regard to seniority systems, the guidelines of OFCCP are stronger than those of the Equal Employment Opportunity Commission. This is because the United States Supreme Court recently held that seniority systems that are otherwise neutral and legitimate do not become unlawful under Title VII simply because they perpetuate the effect of discrimination that occurred before passage of the law.[38] Shortly after the United States Supreme Court's ruling on seniority, the Assistant Secretary for Employment Standards announced that "Federal contractors and subcontractors, and their employees, should be aware that the Supreme Court ruled on the effects of seniority systems on employment practices under Title VII of the Civil Rights Act, not under Executive Order 11246."[39] He also stated:

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[37] An analysis of the new guidelines is contained in Chapter 6 infra, The Equal Employment Opportunity Coordinating Council. DOL commented:

> OFCCP recognizes that Federal employment selection guidelines should be uniform. OFCCP has taken specific steps to reconcile the differences between its guidelines and that of other Federal EEO agencies. However, given the errors contained in the draft chapter 6 on the Equal Employment Opportunity Coordinating Council, the judgment that OFCCP's guidelines are weaker than EEOC's is not substantiated nor constructive. To evaluate this criticism, the basis for the judgment is needed. Sept. 9, 1977, Elisburg letter, supra note 1.

The Commission has carefully reviewed DOL's comments on Chapter 6 and has concluded that it stands by its criticism of those guidelines and its findings that the Federal Executive Agency Guidelines are weaker than those of EEOC.

[38] International Brotherhood of Teamsters v. United States, 97 S. Ct. 1843 (1977).

> This department has long held that discrimination continued under the guise of a seniority system is a violation of the employer's contractual agreement with the government. We will continue to demand modification, under the executive order, of pre-1965 seniority systems which perpetuate the past effects of employment discrimination.[40]

OFCCP has not revised its guidelines on sex discrimination, and thus they continue to be weaker than those issued by EEOC. This judgment is based on the fact that as of September 1977, the OFCCP guidelines contained three deficiencies[41] noted by this Commission in 1975:

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[39] Department of Labor, News, July 29, 1977. See also Sept. 6, 1977, Elisburg letter, supra note 1. Mr. Elisburg also noted that he had instructed the Director, OFCCP, "to take a hard look at our program." Id.

[40] Department of Labor, News, July 29,1977.

[41] These deficiencies are discussed more fully in Volume V, supra note 2, at 247-49.

1) As of September 1977, the guidelines did not contain a statement making clear that they prohibit employers from maintaining leave policies which require pregnant women to leave their employment at a specific stage of pregnancy, regardless of an individual woman's ability to work. A 1973 proposed revision to the guidelines[42] would have remedied this deficiency but was never adopted. Nonetheless, OFCCP states that it interprets its sex discrimination guidelines broadly. Specifically, DOL wrote to this Commission:

> OFCCP does prohibit contractors from maintaining maternity leave policies which require pregnant women to leave at a specific stage of their pregnancy. The guidelines issued in 41 CFR 60-20.3 are broad statements of purpose, which are interpreted according to established legal precedent. Currently, we are having withheld a $300,000,000 contract with Pan American for exactly this purpose. Additionally, numerous conciliation agreements have contained the agreement to eliminate such maternity leave policies. [43]

2) As of September 1977, OFCCP's guidelines did not prohibit contractors from maintaining fringe benefit policies, e.g., pension plans, which have a differential effect on the basis of sex.[44]

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[42] 38 Fed. Reg. 35336 (Dec. 27, 1973).

[43] Sept. 9, 1977, Elisburg letter, *supra* note 1.

[44] This issue and the Department of Labor's position is discussed more fully in Chapter 6, *infra*, the Equal Employment Opportunity Coordinating Council.

3) OFCCP's guidelines permitted discrimination on the basis of sex if sex is a bona fide occupational qualification (BFOQ) without stating that courts have narrowly interpreted this exception under Title VII. Although Executive Order No. 11246, as amended, contains no BFOQ exception, OFCCP's guidelines state, "Employees of both sexes shall have an equal opportunity to any available job that he or she is qualified to perform, unless sex is a bona fide occupational qualification."[45] DOL commented, however, that "we generally follow the precedent established by court cases under Title VII law and their narrow construction of such cases."[46]

With regard to these three criticisms of OFCCP's sex discrimination guidelines, and the resulting conclusion that these guidelines are weaker than those issued by EEOC, DOL wrote to this Commission:

> The judgment that OFCCP's sex discrimination guidelines are weaker than EEOC's is not substantiated. Thus, there is no way for OFCCP to evaluate the criticism. Further, given the fact that the Supreme Court in Gilbert v. General Electric Co. struck down EEOC's guidelines, this criticism is meaningless. [47]

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[45] 41 C.F.R. § 60-20.3(b) (1976). DOL stated that "According to the provisions of [section] 60-20.3 [of the sex discrimination regulations], sex is not a bona fide occupational qualification." Sept. 9, 1977, Elisburg letter, supra note 1.

[46] Sept. 9, 1977, Elisburg letter, supra note 1.

[47] Id.

This Commission believes that its criticism of OFCCP's guidelines is substantiated in this report. In addition, as this Commission has noted, further discussion of these criticisms is contained in Volume V. Moreover, this Commission finds that the United States Supreme Court's decision in Gilbert[48] is not relevant to the three criticisms the Commission has made. In Gilbert, the Supreme Court ruled that the exclusion of pregnancy-related disability benefits from an otherwise comprehensive, privately-funded, employee benefit plan did not constitute sex discrimination prohibited under Title VII of the Civil Rights Act of 1964. None of the three criticisms made by the Commission concerns pregnancy-related disability benefits.

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[48] 429 U.S. 125 (1976).

II. Organization and Staffing

In 1977, new appointees to high level positions in the Department of Labor expressed firm commitment to improve DOL's record in the enforcement of Executive Order No. 11246. On March 18, Secretary of Labor Ray Marshall announced an agreement by a large Federal contractor to pay more than $275,000 to 1,125 employees and former employees. He stated:

> The contract compliance efforts of the federal government have been widely criticized in the past. But an agreement like this one is a tangible example of what can be done by the Labor Department's Office of Federal Contract Compliance Programs. I see this as just the first of many such far-reaching agreements under this program during the Carter Administration....As Secretary of Labor, I pledge to do everything in my power to eradicate discrimination in employment.[49]

The Department of Labor has taken a critical look at its previous record. One of the first actions of the Assistant Secretary of Labor for Employment Standards following his appointment on March 13, 1977, was to establish a Special Task Force to review the Office of Federal Contract Compliance Programs and develop a plan for its improvement.[50] OFCCP noted that:

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[49] DOL News, Mar. 18, 1977. The Assistant Secretary For Employment Standards wrote to this Commission:

> ...at the Urban League's Washington conference, the Secretary of Labor expressed dissatisfaction with OFCCP's organizational setup. At the same conference, Mr. Weldon J. Rougeau, OFCCP's newly appointed Director, conducted a lengthy seminar which dealt at great length with his expectations of the Federal Contract Compliance Program. Sept. 6, 1977, Elisburg letter, *supra* note 1.

At the National Urban League conference, Secretary of Labor Marshall stated:

> Another thing that I'd like to mention is civil rights. After eight years of neglect the civil rights machinery of government has grown rusty. We have brought in new people throughout the government with orders to scrape the rust off and get the machinery running again. One of the early assessments that we made was that it wasn't the laws that caused the trouble in not having adequate civil rights enforcement. It was the administration of those laws and that we need to get people who would administer those laws effectively and were serious about it. Ray Marshall, Secretary of Labor, Presentation before the National Urban League, July 26, 1977.

> Some of the problems identified by the Commission have also been recognized by the task force and solutions proposed for them.. . .OFCCP intends to take specific steps to correct problem areas in its compliance structure through regulatory and structural changes. We welcome reports from organizations such as the Civil Rights Commission to help us in our commitment to strengthen our program.[51]

The Department of Labor has summarized the impact of this new leadership on the OFCCP program:

> During the first four months of Mr. [Weldon] Rougeau's [Director, OFCCP] leadership, the OFCCP has debarred three contractors, proposed regulations establishing goals and timetables for women in construction and establishing a framework for national standards and undertaken a comprehensive and thorough review of how the program can be improved. All of this adds up to an agency that takes its responsibility seriously and, with the full backing of the Department, is committed to fulfilling its mission.[52]

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[50] This report was released in September 1977. DOL, *Preliminary Report on the Revitalization of The Contract Compliance Program* (September 1977).

[51] Sept. 9, 1977, Elisburg letter, *supra* note 1.

[52] *Id*. OFCCP's debarment of contractors and proposed regulations establishing goals and timetables for women in the construction industry are discussed *infra* this chapter.

OFCCP's staff size and responsibilities have grown considerably since Volume V was written because OFCCP has been delegated the task of overseeing compliance by Federal contractors with Section 503 of the Rehabilitation Act of 1973, as amended, and Section 402 of the Vietnam Era Veterans Readjustment Assistance Act of 1974.[53/] In 1975, the former Office of Federal Contract Compliance (OFCC) became the Office of Federal Contract Compliance Programs (OFCCP) to reflect the fact that it included both an Executive Order 11246 Program and a Veterans and Handicapped Workers Program (VHWP). In fiscal year 1977, about 40 percent of OFCCP's total staff (87 persons) were assigned to work in the VHWP.[54/]

In fiscal year 1977, OFCCP's authorization for staff and budget for the Executive Order Program had not changed substantially since 1974. The 1977 authorization was for 77 positions in the national office and

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53/ Letter from Donald Elisburg, Assistant Secretary of Employment Standards, Department of Labor, to Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights, July 30, 1977 /hereinafter referred to as Elisburg letter/.

Section 503 of the Rehabilitation Act of 1973, as amended, requires Federal contractors to take affirmative action to employ the physically and mentally handicapped and Section 402 of the Vietnam Era Veterans Readjustment Assistance Act of 1974 requires Federal contractors to take affirmative action to employ qualified Vietnam-era and disabled veterans. Responsibility for implementing these requirements is delegated to the Secretary of Labor.

54/ DOL, OFCCP, National Program Strategy for FY 1977, Mar. 15, 1977, and telephone interview with Glorietta Gaston, Administrative Officer, Management Support Staff, OFCCP, DOL, Aug. 22, 1977.

51 positions in the regional offices.[55] OFCCP continued to have a number of vacancies in the Executive Order Program.[56] As of mid-1977, there were 13 vacancies[57] at headquarters, including the key positions of Deputy Director[58] and Associate Director for Agency Compliance (Division III).[59] As a result, only 64 Executive Order Program positions were filled at the headquarters office, and only four of the seven Associate Director positions assigned to Executive order matters[60] were permanently filled. In addition to the vacancy for Associate Director (Division III), the positions of Associate Director for Regional Office Liaison and Associate

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[55] The 1977 distribution of authorized OFCCP staff in the regional offices was as follows: Region I (Boston), 2 professionals, 1 clerical; Region II (New York), 6 professionals, 1 clerical; Region III (Philadelphia), 3 professionals, 1 clerical; Region IV (Atlanta), 4 professionals, 2 clericals; Region V (Chicago), 7 professionals, 2 clericals; Region VI (Dallas), 5 professionals, 1 clerical; Region VII (Kansas City), 2 professionals, 1 clerical; Region VIII (Denver), 2 professionals, 2 clericals; Region IX (San Francisco), 5 professionals, 2 clericals; and Region X (Seattle), 2 professionals, 1 clerical. This distribution is essentially the same as in 1974. Data for 1974 is given in Volume V, supra note 2, at 259.

[56] DOL responded "The discussion on this page does not acknowledge the change of administration and the time required to obtain appointments for those nominated by the political process." Sept. 9, 1977, Elisburg letter, supra note 1 . Weldon Rougeau, Director, OFCCP, was not appointed to his position until June 5, 1977.

[57] There was also one vacancy in the Veterans and Handicapped Workers Program Operations Division. OFCCP Status of Personnel Actions, June 9, 1977.

[58] This position had been vacant for 6 months. Telephone interview with Madeline Hachey, Secretary to the Chief, Branch of Classification, ESA, DOL, Aug. 8, 1977. As of late July 1977, this position was being filled on an acting basis by the Associate Director of Program Policy and Planning. On August 22, 1977, Mr. Rougeau appointed Richard J. Devine as the Deputy Director.

[59] The position of Associate Director for Agency Compliance (Division III) has been vacant since Oct. 16, 1975. OFCCP, Status of Personnel Actions, Oct. 16, 1975, Oct. 15, 1976, and June 9, 1977.

[60] Within OFCCP there was an eighth Associate Director position for the Veterans and Handicapped Workers Program Operations Division. Id.

Director for Program Policy and Planning were not filled permanently by someone who could devote full time to the job.[61]

One improvement that had been made since the Commission's 1974 study is that an additional industrial pyschologist was hired to provide assistance on reviewing testing validation studies. As of July 1975, there was no backlog for evaluations and requests for assistance were met in less than 30 days.[62]

The Director of OFCCP reported that since 1975, its status in the Department of Labor has hampered its ability to provide direction to the compliance agencies.[63] However, the Department of Labor has taken two actions to upgrade the status of the OFCCP within the Department of Labor. These actions are:

- The position of Director, OFCCP, has been upgraded from GS-16 to GS-18.
- The Assistant Secretary for Employment Standards to whom the Director of OFCCP reports, reports directly to the Secretary of Labor, eliminating the step of clearance of OFCCP actions by the Under Secretary.

61/ The position of Associate Director of Program Policy and Planning was held by someone who was serving as the Acting Deputy Director. Her function as Associate Director, in turn, was being carried out by the Associate Director of Regional Liaison who continued to perform her regional liaison duties as well. Interview with Doris Wooten, Acting Associate Director for Program Policy and Planning and Associate Director for Regional Office Liaison, OFCCP, July 22, 1977.

62/ Elisburg letter, supra note 53, at 4.

63/ Interview with Weldon Rougeau, Director, OFCCP, DOL, July 19, 1977. According to Mr. Rougeau, the fact that the Director held a GS-16 position and was three levels below the Office of the Secretary prompted compliance agencies to believe that OFCCP should not provide direction for the operation of their programs. Id.

OFCCP's budget for the Executive Order Program for fiscal year 1977 is $4.1 million. This represents an increase of about 32 percent over the budget of $3.1 million in fiscal year 1974.[64]

OFCCP continues to receive staff support from other DOL units. The Assistant Secretary for Employment Standards noted that ESA provides OFCCP with "administrative services, such as data processing, reproduction, and personnel; and management services, such as accountability and review, budgeting, and management analysis."[65] In addition, he noted that:

> The Solicitor of Labor (SOL) is by law the official to whom all Department of Labor legal activities are assigned. Within the Office of the Solicitor, the Division of Labor Relations and Civil Rights provides legal services to the OFCCP. SOL reviews all proposed regulatory changes, provides legal advice, and represents OFCCP in enforcement proceedings.[66]

64/ OFCCP Budget and Staffing Allocations, undated.

65/ Elisburg letter, supra note 53, at 2.

66/ Id. at 3.

As of July 1977 the organization of the OFCCP headquarters office did not differ markedly from the one in effect in 1974. OFCCP's organization as of July 1977 is shown in Exhibit 2-1. As DOL describes that organization:

> The current organization, approved in 1975, consists of six operating divisions (the Veterans and Handicapped Worker Program Operations Division, the Construction Compliance Division, 67/ and four agency compliance

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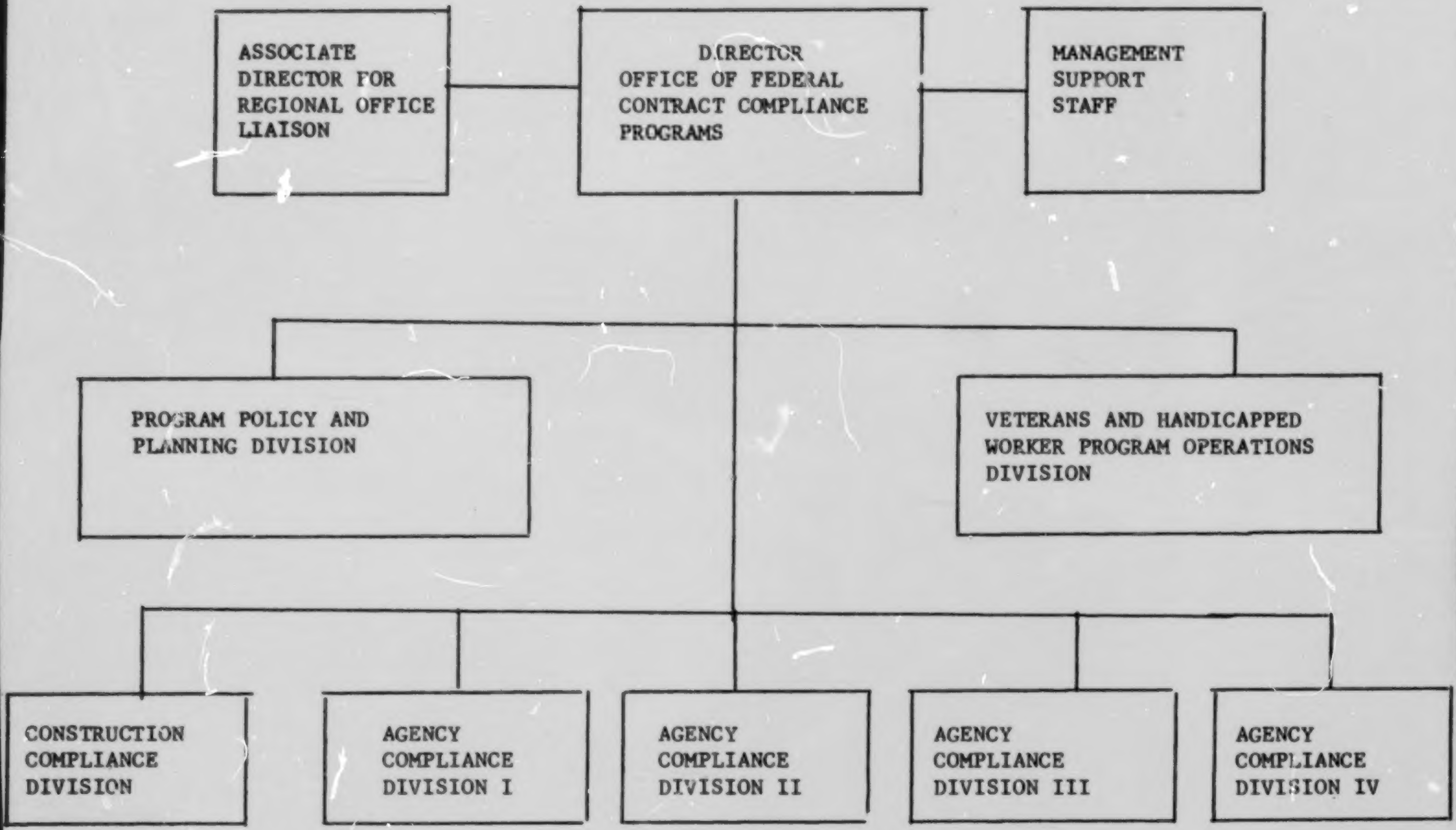
67/ DOL described the Executive order functions of the Construction Compliance Division:

> The Construction Compliance Division conducts management evaluation and compliance operation activities to support Federal construction and federally assisted construction programs of Compliance Agencies. Its authority comes from parts II and III of E.O. 11246, as amended... Compliance by the construction industry is supervised by a separate division primarily because of the different procedures and methods used in that program, such as hometown plans and area plans. Elisburg letter, supra note 53, at 4.

Exhibit 2-1


ASSOCIATE DIRECTOR FOR REGIONAL OFFICE LIAISON
DIRECTOR OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS
MANAGEMENT SUPPORT STAFF
PROGRAM POLICY AND PLANNING DIVISION
VETERANS AND HANDICAPPED WORKER PROGRAM OPERATIONS DIVISION
CONSTRUCTION COMPLIANCE DIVISION
AGENCY COMPLIANCE DIVISION I
AGENCY COMPLIANCE DIVISION II
AGENCY COMPLIANCE DIVISION III
AGENCY COMPLIANCE DIVISION IV

divisions).68/ A Division of Program Policy and Planning 69/ and a Management Support Staff 70/ comprise the line support. All eight divisions report to the Director, OFCCP. 71/

68/ OFCCP describes the functions of these four divisions:

> Agency compliance divisions I through IV are responsible for monitoring supply and service Compliance Agencies. Each agency compliance division maintains liaison with and provides assistance to its assigned compliance agencies. Each division monitors its agencies' activities to ensure that the agencies are fulfilling their responsibilities under E.O. 11246....Vietnam Era Veterans Readjustment Assistance Act of 1974, and the Rehabilitation Act of 1973. Id. at 3.

In fiscal year 1977, the distribution of responsibility among these divisions was:

> Agency Compliance Division I: DOD
> Agency Compliance Division II: ERDA, HEW, Treasury
> Agency Compliance Division III: GSA, Interior, USDA
> Agency Compliance Division IV: Commerce, VA, DOT

DOL, OFCCP, National Program Strategy for FY 1977, Mar. 15, 1977.

69/ OFCCP described the functions of the Program Policy and Planning Division:

> Subject to overall ESA policies and priorities, the Division of Program Policy and Planning is responsible for developing and analyzing OFCCP policies and plans. Its functions include initiating, formulating, and interpreting Federal contract compliance programs, regulations, and procedures. The division also helps formulate program budgets and program implementation guidelines for the Compliance Agencies. Elisburg letter, supra note 53.

70/ According to DOL:

> The Management Support Staff serves as liaison with the Office of Administrative Management and the Office of Program Development and Accountability on all service and support activities such as budget, personnel, and office services. It controls all OFCCP correspondence and processes and analyzes [complaints received by the Department of Labor regarding possible violations of Executive Order No. 11246]. Id.

Id.

The only major structural changes from 1974 to 1977 were as follows: First, a Veterans and Handicapped Worker Program Operations Division was added. Second, OFCCP's responsibility for training its own staff was combined with the training of ESA staff and was housed with ESA's administrative staff. Thus, OFCCP's former Training and Administrative Support Staff became the Management Support Staff, retaining the administrative functions it had when Volume V was written.[72] Third, OFCCP created the position of Associate Director for Regional Office Liaison.[73]

Despite the new position of Associate Director for Regional Liaison, DOL has not improved its procedures for OFCCP contact with contract compliance staff in the regional offices.[74] As of July 1977, DOL continued to require that OFCCP directives to the field be sent through the Assistant

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[72] These functions are described in note 70 *supra*.

[73] This position was created in July 1976.

[74] DOL reports that regional offices are responsible for implementation of the handicapped and veterans programs; monitoring contractors' performance under the construction compliance program; and conducting compliance agency audits, post compliance review audits, and other evaluative procedures. Elisburg letter, supra note 53, at 3.

Secretary for Employment Standards and through top regional officials.[75] Thus, OFCCP's authority was limited. Moreover, in light of the fact that the Associate Director for Regional Liaison was detailed to serve as the Acting Associate Director for Program Policy and Planning for several months it seems likely that OFCCP could not fully exercise its regional liaison functions during these months.

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[75] DOL responded:

> The report apparently does not understand the structural relationship between OFCCP and its Regional Office Staff. The Associate Regional Administrator is administratively responsible to the Assistant Secretary for Employment Standards. OFCCP does not directly administer its Regional Office Staff. Therefore, the judgment in the chapter regarding the impact of the Associate Director (AD) for Regional Liaison is without basis. Sept. 9, 1977, Elisburg letter, supra note 1.

It is just this structural relationship, described by Mr. Elisburg, that the Commission criticizes. This criticism was also made by the Commission in 1975. See Volume V, supra note 2, at 257.

III. The Compliance Agencies

Between late 1974 and August 1977 there had been only minor changes in the structure and resources of the contract compliance programs. Exhibit 2-2 identifies the compliance agencies and includes, for each, the budget and person years allocated for contract compliance activities for fiscal year 1977.

Since Volume V was written, the number of compliance agencies has decreased from 17 to 16. This is because as of July 1975, the Postal Service ceased to serve as a compliance agency.[76] In addition, the compliance program of the Atomic Energy Commission (AEC)

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[76] The Postal Service, formerly the Post Office Department, became an independent establishment of the Executive Branch (39 U.S. §201) in August 1970. After that time, it operated its compliance program by memorandum of agreement with OFCCP. The terms of the agreement were that it could be terminated by notice from either party. The Postal Service terminated it in July 1975, and its compliance functions were transferred to GSA. Telephone interview with A. Diane Graham, Associate Director, Program Policy and Planning Division, OFCCP, DOL, Aug. 23, 1977.

EXHIBIT 2-2

Contract Compliance Resources
Fiscal Year 1977

Compliance Agency	Person Years	Budget Authority $ (000)
Department of Agriculture	52	1,078
Department of Commerce	25.5	626
Department of Defense	548	10,978
Environmental Protection Agency	37	787
Energy Resources and Development Administration	105	2,998
General Services Administration	214	4,680
Department of Health, Education and Welfare	154	4,543
Housing and Urban Development	135	3,223
Department of the Interior	70	1,790
Department of Justice	4	75
National Aeronautics and Space Administration	9	211
Small Business Administration	14	342
Tennessee Valley Authority	3	65
Department of Transportation	94	2,358
Department of the Treasury	43	1,332
Veterans Administration	56	1,244
Total	1,563.5	36,330

SOURCE: Office of Federal Contract Compliance Programs, Program Guidance Memorandum for Fiscal Year 1977

was transferred to the Energy Research and Development Administration (ERDA) when AEC was abolished and a number of its other duties were assigned to the newly created ERDA in January 1975.

There has been a decrease in the total staff allocated to contract compliance activities, although there has been an increase in the budget. In fiscal year 1974, the total staff level of the compliance agencies was 1,738 person-years and the total budget was $31 million.[77] In fiscal year 1977, the staff level was only 1,563.5 person-years, a decrease of 174.5 person years from 1974. At the same time the budget increased to $33,330,000.[78]

77/ The 1974 staffing of the compliance agencies is discussed in *Volume V*, *supra* note 2.

78/ OFCCP, Draft Program Guidance Memorandum for FY 1978. In fiscal year 1976, only 1,509.5 person-years were allocated to the contract compliance program. The budget was $34,183,000. *Id*.

As shown in Exhibit 2-3, however, over that 3-year period the number of compliance staff decreased in only 6 agencies and increased in 9 others.[79] The biggest change occurred in HEW, which lost 90 persons from its contract compliance program, and about $2.1 million during that time.

The contract compliance program continued to be operated in two parts; 1) construction and 2) nonconstruction (referred to as supply and services). Exhibit 2-4 shows the distribution of staff and budget of the two areas in 1974 and 1977. Although the construction program has grown slightly, in terms of staff size, while the nonconstruction program has decreased slightly, construction continues to constitute about one quarter of the entire contract compliance program.[80] Exhibit 2-5 shows the distribution of resources of supply and services and construction, by agency, for fiscal year 1977.

79/ In one case the staff remained constant. Two agencies, AID and the Postal Service, no longer functioned as compliance agencies.

80/ DOL reported that "Until 1976, construction contract compliance dominated the Executive Order Program in the regions, but an ESA directive significantly increased the level of activity concerning supply and service contract compliance." This directive instructed regional staff working on the Executive Order Program to spend 50 to 75 percent of their time evaluating compliance by supply and service industries. DOL, Employment Service Administration Notice 76-3, (1976).

EXHIBIT 2-3

Compliance Agency Staff Level
1974 and 1977

Agency	1974	1977
Department of Agriculture	50	52
Agency for International Development*	11	-
Department of Commerce	31	25.5
Environmental Protection Agency	14	548
Energy Research and Development Administration**	89	105
General Services Administration	188	214
Department of Health, Education and Welfare	244	154
Housing and Urban Development	125	135
Department of the Interior	78	70
Department of Justice	2	4
National Aeronautics and Space Administration	29	9
U.S. Postal Service***	235	-
Small Business Administration	14	14
Department of Transportation	135	94
Department of the Treasury	35	43
Tennessee Valley Authority	2	3
Veterans Administration	38	56
Total	1,738	1,563

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* On August 1, 1974, the responsibilities of AID were transferred to other agencies.

** Until January, 1975, this program was at the Atomic Energy Commission.

*** In July 1975, the responsibilities of the U.S. Postal Service were transferred to GSA.

SOURCE: Office of Federal Contract Compliance Programs, Program Guidance Memorandum for Fiscal Year 1974 and 1976

EXHIBIT 2-4

Distribution of Resources for Supply and Services and Construction Fiscal Years 1974 and 1977

	Construction		Supply and Services	
	Person Years	Budget Authority $(000)	Person Years	Budget Authority $(000)
1974	388.5	7,638	1,232	24,231
1977	427	9,697	1,136.5	26,633

SOURCE: Office of Federal Contract Compliance Programs, Program Guidance Memorandum for Fiscal Year 1974 and 1976

EXHIBIT 2-5

Staff Resources Devoted to Supply and Services and Construction
1977

Compliance Agency	Staff Resources (Person Years)	
	Supply and Services	Construction
Department of Agriculture	49	3
Department of Commerce	19.5	6
Department of Defense	518	30
Environmental Protection Agency	-	37
Energy Research and Development Administration	98	7
General Services Administration	169	45
Department of Health, Education and Welfare	102	52
Housing and Urban Development	-	135
Department of the Interior	63	7
Department of Justice	-	4
National Aeronautics and Space Administration	-	9
Small Business Administration	-	14
Tennessee Valley Authority	-	3
Department of Transportation	28	66
Department of the Treasury	43	-
Veterans Administration	9	47

SOURCE: Office of Federal Contract Compliance Programs, Program Guidance Memorandum for Fiscal Year 1977

OFCCP estimates that the compliance agencies are responsible for enforcing Executive Order 11246 for an estimated 30 million workers employed by 325,000 contractors receiving more than $50 billion annually in Federal contracts.[81/] It estimates that 275,000 of these are in the supply and services area and that the remaining 50,000 perform on building and construction contracts.[82/]

As of October 1, 1977, the number of compliance agencies will be reduced from 16 to 11. This reorganization was proposed by the Department of Labor in March 1977 and has been approved by OMB. The Employment Standards Administration[83/] has reported that the consolidation strategy will improve its "span of control and reduce enforcement duplication, while at the same time, avoiding massive organizational and productivity disruptions." ESA

[81/] DOL, OFCCP, National Program Strategy for FY 1977, Mar. 15, 1977.

[82/] *Id*.

[83/] As is discussed earlier, OFCCP is located with the Employment Standards Administration of the Department of Labor.

foresees an enforcement effort with "less overlap, more consistency, and better organization."[84] This partial consolidation approaches this Commission's 1974 recommendation that, as an interim goal, OFCCP should consolidate the current delegation of authority in fewer than 10 agencies.[85] Upon implementation of the proposal, the Department of Agriculture and the Veterans Administration will lose responsibilities for both supply and services contracts and construction contracts. An additional six agencies will lose responsibility in the construction area.[86] Exhibit 2-6 shows how staff will be allocated in the contract compliance program after the reorganization. A comparison between Exhibits 2-5 and 2-6 shows the transfer of responsibilities from those agencies losing their programs, in either supply and services or construction, to other agencies.

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[84] Consolidation of Compliance Agency Executive Order 11246 Enforcement Responsibilities, Office of Federal Contract Compliance Programs, Employment Standards Administration, U.S. Department of Labor, Mar. 3, 1977 /hereinafter referred to as OFCCP Consolidation Plan/.

[85] Volume V, *supra* note 2, at 663.

[86] These are: The Department of Commerce; the Department of Health, Education, and Welfare; the Department of the Interior; the Department of Justice; the National Aeronautics and Space Administration; and the Tennessee Valley Authority, OFCCP Consolidation Plan, *supra* note 84.

EXHIBIT 2-6

Person Years Devoted to Supply and Service And Construction -- Fiscal Year 1978 (After Consolidation)

Compliance Agency	Supply and Services	Construction
Department of Agriculture	-	-
Department of Commerce	20.5	-
Department of Defense	567	39
Environmental Protection Agency	-	50
Energy Research and Development Administration	145	7
General Services Administration	169	49
Department of Health, Education and Welfare	102	-
Housing and Urban Development	-	202
Department of the Interior	70	-
Department of Justice	-	-
National Aeronautics and Space Administration	-	-
Small Business Administration	-	14
Tennessee Valley Authority	-	-
Department of Transportation	28	66
Department of the Treasury	43	-
Veterans Administration	-	-
Total	1,144.5	427

SOURCE: Office of Federal Contract Compliance Programs, Program Guidance Memorandum for Fiscal Year 1977

One advantage of this reorganization is that it will eliminate some duplication of effort among compliance agencies. This duplication has resulted from the fact that contractor facilities are assigned to the various compliance agencies for review based on industry classification. Several different agencies have responsibility for different facilities of the same corporation if a corporation is a conglomerate and falls into several industry classifications.[87] By reducing the number of compliance agencies in October 1977, OFCCP reduced the scope of this problem.

OFCCP stated:

> OFCCP's decision to consolidate the functions of certain agencies and its proposed consolidation of all compliance functions into the Department of Labor are based upon management efficiency and program effectiveness considerations. Although individual agency performance is a factor in this judgment, it is not and was not the sole basis. Consolidation will provide OFCCP with administrative, as well as functional control over the Executive Order programs, and provide for cost efficiencies and management controls which will enable OFCCP to strengthen the program.[88]

In 1975, this Commission recommended that OFCCP designate as compliance agencies only those agencies which adhere to OFCCP regulations. However, there appears to be little, if any, evidence that any comprehensive comparative evaluation was made of agency performance prior to the decision to consolidate.[89]

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[87] See Volume V, supra note 2, at 271-76 for a discussion of compliance agency assignments based on this system.

[88] Sept. 9, 1971, Elisburg letter, supra note 1.

[89] OFCCP staff would not confirm that such an evaluation existed. Interview with Frank Ridley, Associate Director for Division IV, and Acting Associate Director for Division III, OFCCP, Aug. 23, 1977.

The three agencies which, in 1974, this Commission cited as having poor compliance records[90] (HEW, the Department of the Treasury, and GSA), will maintain their status as compliance agencies. Of the three, only HEW will have diminished responsibility, relinquishing its authority in the construction area to HUD. GSA will gain additional responsibility by acquiring DOJ's present responsibilities in construction. Commission staff found no indication that the three agencies have improved their contract compliance programs since 1974.[91] In fact, HEW, along with DOL, is presently being sued for failure to enforce the Executive order and has been directed by the courts to develop a plan for allocating resources to its Executive Order Program.[92]

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[90] Volume V, supra note 2, at 663.

[91] Commission staff asked OFCCP for evidence that these three agencies had improved since 1974. OFCCP staff did not provide any specific evidence of improvement at HEW or GSA. One OFCCP staff member referred to HEW as a "quagmire" and stated that OFCCP could not consolidate it because OFCCP would "not be able to handle the responsibilities at this time." Interview with Martin Angebrandt, Program Policy and Planning Division, OFCCP, DOL, Aug. 12, 1977.

[92] The lawsuit is discussed in greater detail infra this section.

According to an OFCCP staff member, the Department of the Treasury was originally proposed as one of the agencies whose contract compliance program was scheduled for consolidation, but this plan was cancelled when the Department of the Treasury's performance "improved."[93] The Department of the Treasury had alleged that OFCCP had been remiss in providing adequate guidance. Two OFCCP staff members stated that OFCCP acknowledged its own failure and provided additional assistance. OFCCP commented that as of August 1977, the Department of the Treasury had "come a long way."[94] However, in August 1977, the Department of the Treasury stated that it still had not received adequate guidance from OFCCP nor had it received a written evaluation in 3 years.[95]

A DOL briefing paper proposing consolidation of all compliance agency Executive Order No. 11246 enforcement responsibilities within the Department of Labor was sent to OMB for clearance during summer 1977. OMB has postponed determination on the proposal pending its own reorganization proposal for the civil rights component of the Federal Government.

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[93] Angebrandt interview, supra note 91.

[94] Id. and Graham telephone interview, supra note 76.

[95] Telephone interview with David Sawyer, Director of Equal Opportunity Programs, and Joseph J. Sargent, Chief, Programs Systems Division, Office of Contract Compliance, Department of the Treasury, Aug. 19, 1977.

As of fiscal year 1977, the authorized staff levels and budgets of the agencies continued to bear little relationship to the number of facilities for which the agencies were responsible. Using the most recent data available to OFCCP for the supply and services program, the number of assigned contractor facilities per agency staff member ranged from 19 (Department of Commerce) to 449 (USDA). The level of authorized expenditures per assigned contractor facility ranged from $1,268 (Department of Commerce) to $48 at USDA. Data for all agencies with supply and service responsibilities in 1977 are displayed in Exhibit 2-7.

At least one agency has such a small contractor universe relative to its own staff size, that it reviews its largest contractor semi-annually.[96] This appears to be inordinately frequent, especially since some contractors have never been reviewed. Two agencies, the Veterans Administration and the Department of Agriculture, have so few resources that they could not review all of their contractors once in a 20-year period.[97]

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[96] OFCCP, Fiscal Year 1976 Annual Performance Evaluation. OFCCP asked that the names of the agencies evaluated not be released.

[97] See Exhibit 2-8 *infra* for data, by agency, of the percent of the contractor universe each agency covers in its supply and service programs.

EXHIBIT 2-7

Compliance Agency Budget and Staffing Ratio
(Supply and Services)
Fiscal Year 1977

Agency	Ratio of Authorized Budget to Number of Assigned Facilities	Agency	Ratio of Number of Facilities to Number of Actual Staff Members
Commerce	$1,268	Commerce	19
DOT	1,050	DOT	30
HEW	879	HEW	34
ERDA	679	ERDA	43
DOD	482	DOD	42
Interior	348	Interior	74
Treasury	222	Treasury	140
GSA	166	GSA	144
VA	83	VA	266
USDA	48	USDA	449

SOURCE: Office of Federal Contract Compliance Programs, Program Guidance Memorandum for Fiscal Year 1977

OFCCP does not instruct compliance agencies that, in targeting recipients for review, agencies should give priority to contractors which have not met their affirmative action goals. OFCCP still relies on the Revised McKersie System for determining which industries should be targeted for review.[98] The system is designed to identify those supply and service industries with the greatest underutilization of women and minorities which also offer the most hiring and promotional opportunities.[99] The system is also to be used by compliance agencies in identifying priorities within their own industry grouping.[100]

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[98] Elisburg letter, supra note 53.

[99] DOL wrote to this Commission:

> While it is true that the McKersie targeting system is based upon economic factors, agencies include such considerations as results of compliance reviews, complaints and congressional inquiries when establishing review priorities. Sept. 9, 1977, Elisburg letter, supra note 1.

[100] The system relies on two basic data sources: data from the Equal Employment Opportunity Commission and from the Bureau of the Census. See Volume V, supra note 2, at 283-84 for more information on the Revised McKersie System.

OFCCP policy guidance on target selection also directs that compliance reviews concentrate on those establishments "with the greatest opportunities for minorities and women."[101] This standard is vague, and is interpreted in a variety of ways by OFCCP division directors when they evaluate the adequacy of agency targeting procedures. For example, from OFCCP's fiscal year 1976 annual performance evaluations of the compliance agencies, it appears that one OFCCP division director found compliance with OFCCP targeting procedures when an agency selected facilities for review merely on the basis of extent of underutilization and the size of the contractor's work force. In contrast, another director was more thorough and instructed that targeting should be based on the racial and ethnic composition of the geographic area surrounding the facility, the extent of underutilization, the size of the work force, and anticipated increases in employment.

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[101] Memorandum to Director, Office of Management and Budget, and Heads of All Agencies; Transmittal of FY 1976 Contractor Compliance Program Guidance Memorandum, Oct. 24, 1974. As of fiscal year 1977, this memorandum was still being used as a basis for evaluating agency targeting procedures.

An important component of compliance reviews of Federal contractors is an evaluation of adherence to affirmative action plans. Thus, whether a contractor has met its goals for hiring minorities and women should be an important factor in selecting a contractor for review. However, OFCCP does not so instruct compliance agencies and not all follow such a procedure. Information on the targeting practices of three agencies taken from OFCCP fiscal year 1976 annual performance evaluations showed that only one of the three considered failure to meet goals as a factor in selecting contractors for review. The second agency used only the size of the contracting work force in targeting. The third agency targeted many contractors for review because of problems identified in earlier reviews, developments since earlier reviews, and "recycling of scheduling opportunities."[102] One OFCCP division director stated, moreover, that often compliance agencies target reviews based solely on the size of contracts.

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[102] OFCCP, Fiscal Year 1976 Annual Performance Evaluation.

IV. Supply and Service Program

Although OFCCP has set an overall annual goal for compliance agencies to review at least 20 percent of their contractor universe,[103] few agencies have met that goal. OFCCP also advised agencies as to the specific number of reviews they should conduct in fiscal year 1977, based on the actual resources available. However, these target figures sometimes fell far short of the 20 percent figure. Exhibit 2-8 ranks the supply and service agencies by the percent of their contractor universe which OFCCP anticipated they should cover in fiscal year 1977, and lists the number of reviews which each agency was expected to undertake. Moreover, as shown in Exhibit 2-9, agencies conduct far fewer reviews than recommended by OFCCP. OFCCP commented, "...we have no authority to require agencies to follow our recommendations with regard to the use of their resources. This problem is one of the major reasons for the proposed consolidation."[104]

103/ OFCCP, Program Guidance Memorandum for Fiscal Year 1976. If this goal were met, each contractor would be reviewed, on the average, once every five years.

104/ Sept. 9, 1977, Elisburg letter, *supra* note 1. Mr. Elisburg was referring to the consolidation of all Executive Order 11246 responsibilities within OFCCP.

EXHIBIT 2-8

Planned Compliance Reviews in Supply and Services Industry

Fiscal Year 1977

Compliance Agency	Percent of Universe	FY 77 Planned Compliance Reviews
Department of Commerce	63.7	242
Department of Defense	29.4	6,320
Energy Research and Development Administration	28.7	1,200
Department of Transportation	22.2	186
Department of Health, Education and Welfare	21.6	740
Department of the Interior	20.4	945
General Services Administration	15.6	3,800
Department of the Treasury	12.5	750
U.S. Department of Agriculture	4.6	1,000
Veterans Administration	3.4	430

SOURCE: Office of Federal Contract Compliance, Program Guidance Memorandum for Fiscal Year 1967

EXHIBIT 2-9

Compliance Reviews (Supply and Services)
Fiscal Year 1976

Compliance Agency	Percent of Scheduled Reviews Conducted	Percent of Contractor Universe Reviewed*	Number of Compliance Reviews Scheduled	Number of Compliance Reviews Conducted
VA	76.3	2.3	380	290
DOT	74.7	16.6	186	139
ERDA	69.0	20.7	1,253	864
Commerce	65.6	53.2	308	202
GSA	63.5	11.6	4,454	2,828
DOD	58.9	23.5	8,560	5,050
Treasury	56.0	3.5	375	210
USDA	55.5	2.3	926	514
Interior	52.9	10.8	945	500
HEW	6.4	1.5	785	50
Total	58.6	10.7	18,172	10,647

*These percentages are based on OFCCP data on the size of the contractor universe. As discussed infra, some agencies dispute OFCCP's computation of the contractor universe.

SOURCE: Office of Federal Contract Compliance Programs, Program Compliance Memorandum for Fiscal Year 1976

Since the publication of Volume V, preaward reviews have risen from 7 percent of all compliance reviews to 17.8 percent. Between April 1975 and March 1976, 2,445 preaward reviews were conducted of a compliance review universe of 13,752.[105]

OFCCP and the compliance agencies do not have an effective method of identifying Federal contractors. A problem which existed in 1974 and which has not yet been resolved is the absence of a method to assure that each compliance agency knows the names or even the number of all the Government contractors in its industry classifications.[106] In the last two years, in an attempt to correct the situation, OFCCP engaged the firm of Dun and Bradstreet to develop a contractor listing system to supplement the Revised McKersie System.[107]

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[105] Elisburg letter, supra note 53.

[106] DOL noted:

> ...the Office of Federal Procurement Policy in OMB will be maintaining a list of all Federal contractors with contracts of $10,000 or more. This additional resource will provide OFCCP with an additional contractor listing. Thus, at the present time there does not appear to be a justifiable need for another contractor listing. Sept. 9, 1977, Elisburg letter, supra note 1.

[107] Id.

One OFCCP staff member stated that the Dun and Bradstreet listing, "although not universal, is comprehensive and up-to-date."[108] The listing has adapted information from forms submitted to the Wage and Hour Division of the Employment Standards Administration, EEO-1 forms[109] and notice of contract awards in the Commerce Business Daily. The Dun and Bradstreet listing gives names and locations of contractors and the amounts of the contracts.

The major problem with the listing is that, under the terms of the agreement between OFCCP and Dun and Bradstreet, the listing remains the property of Dun and Bradstreet. OFCCP cannot share it with the compliance agencies. Although Dun and Bradstreet has also sold the listing to a few of the agencies (DOD and GSA, for example), the other agencies benefit only indirectly by establishing through OFCCP regional offices whether a particular company is a Government contractor. The agencies which do not have the benefit of the Dun and Bradstreet listing continue to rely on the EEO-1 forms for their contractor universe estimates. Thus, OFCCP's estimate of an agency's contractor universe may not be the same as the agency's own estimate. For example, in fiscal year 1976, Dun and Bradstreet listed over 20,000 supply and service contractors for USDA. However, the Chief of the Contract Compliance Division at USDA informed this Commission that USDA verified that in that year it had responsibility for only 6,074 contractors.[110]

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[108] Telephone interview with Martin Angebrandt, Program Policy and Planning Division, OFCCP, Aug. 12, 1977.

[109] EEO-1 forms are the forms used by EEOC to obtain data on private employers. These forms ask contractors to indicate if they are Government contractors.

[110] Telephone interview with Martin Osias, Chief, Contract Compliance Division, USDA, Aug. 19, 1977.

Although an accurate list of contractors is imperative for planning compliance reviews and allocating resources for a compliance program, DOL apparently believes that there has not been a need for a more effective method of identifying Federal contractors. DOL stated:

> This discussion of OFCCP's awareness of its full universe of coverage is misleading. The fact that neither OFCCP nor its compliance agencies have a complete list of all covered contractors has not been the cause of program weakness. Through the use of numerous public listings, including EEO-1 and Dun and Bradstreet, Compliance Agencies (CA) are able to identify most contractors. Additionally, through complaints and previous reviews as well as request for pre-awards, CA's are able to identify other contractors requiring a review. With current resources it is impossible for OFCCP or the CA's to review all contractors. With current resources, OFCCP and CA's are able to identify contractors which are covered when it is necessary to do so.111/

OFCCP does not have an effective reporting system. OFCCP does not have readily available information as to:

> Whether conciliation agreements are being adhered to, or even what these agreements entail
>
> The status of enforcement actions pending against contractors 112/
>
> The number of minorities and females employed from year to year.

111/ Sept. 9, 1977, Elisburg letter, *supra* note 1.

112/ However, recently OFCCP developed an index, or method of keeping track of the various stages of enforcement activity engaged in by Federal contractors. Telephone interview with William Holmes, Program Analyst, Program Policy and Planning Division, OFCCP, DOL, Aug. 12, 1977.

However, this failure is not due to the absence of a reporting system per se. Indeed, presently OFCCP suffers from failure to organize the vast amount of information it receives in a manner which effectively measures the success of the Executive order program.[113/] As of October 1977, the OFCCP Deputy Director said that OFCCP is aware of its deficiencies in reporting systems, and that current systems are clearly inadequate. The Deputy Director reported that steps were being taken to replace the current systems with a newer more comprehensive one. A contractor has been selected to begin an assessment of the need for change.[114/]

Compliance agencies are required to submit a number of reports to OFCCP each year. The first of these are monthly progress reports which primarily furnish numerical information such as staffing, wages, travel, number of contractors reviewed, number of preaward reviews conducted, number of complaints filed, number of conciliation reviews conducted, number of sanctions applied to contractors, and the number of show cause notices issued.

Although Executive Order No. 11246 was amended in 1967 to prohibit discrimination in contractor employment based on sex, OFCCP has thus far failed to incorporate requirements for data on sex into its monthly reporting requirements. According to the Acting Director of the Program Policy and Planning Division, OFCCP staff is presently "working on" revising its reporting requirements to include this data. The division has set a goal for completion of the revisions before the new fiscal year.[115/]

[113/] Telephone interview with Aaron Shapiro, Program Policy and Planning Division, OFCCP, DOL, Aug. 23, 1977.

[114/] Interview with Richard J. Devine, Deputy Director, OFCCP, DOL, Oct. 7, 1977.

[115/] Interview with Doris Wooten, Acting Associate Director, Program Policy and Planning Division and Associate Director for Regional Office Liaison, OFCCP, DOL, July 22, 1977.

The second reporting requirement is the submission of quarterly reports which contain scheduling information, including: (1) a list of contractors scheduled for review; (2) a list of contractors which were reviewed but had not been scheduled for review; and (3) a list of contractors targeted but not reviewed. The third requirement, a coding sheet, in many ways duplicates the monthly reports. The primary difference is that the data is computerized.[116] The coding sheet was developed to carry out the requirements of Revised Order No. 14.[117]

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[116] Wooten interview, *supra* note 115.

[117] See *Volume V*, *supra* note 2, at 309 for a discussion of Revised Order No. 14.

The sheet shows the contractor facility reviewed, the type of review,[118/] the hours expended in conducting the review, and the deficiencies found. It also calls for a narrative statement concerning affected class problems and EEOC charges still pending. The coding sheet includes Table Q, which is designed to show the contractor's workforce, cross-tabulated by race, ethnicity, and sex, for at least one year prior to the compliance review and at the beginning of the current affirmative action program year; the total number of persons hired during the year preceding the review cross-tabulated by race, ethnicity, and sex; and the number of females and minorities the contractor will attempt to hire during the current plan year.[119/]

[118/] For example, the sheet shows whether the review is a preaward, post-award, or followup review or whether it is a review conducted to investigate a complaint.

[119/] For a more indepth discussion of Table Q, see *Volume V*, *supra* note 2, at 325-27. Criticisms this Commission made of the Table at that time include the fact that it does not call for data on past or projected promotions of minorities and women. It thereby nullifies the potential for evaluating the adequacy of targets and the extent to which contractors have met them. The coding sheet also fails to make the important distinction between ultimate goals to eliminate underutilization and annual hiring and promotion objectives. *Volume V*, *supra* note 2, at 326-27.

One Associate Director stated that most agencies do not correctly submit Table Q data. He observed that the data the agencies supplied was generally old; that it was not complete; that minority group data were aggregated rather than separately reported by group, such as black or Hispanic; and that data on minorities was not broken down by sex. He expressed the view that because agencies were not accurately using it, Table Q was "worthless."[120/]

The Program Policy and Planning Division is in the process of reviewing OFCCP's reporting requirements to determine whether they can be combined and simplified. In addition DOL has recently solicited bids for a total redesign of its management information system. It hopes that this system will be instituted by the end of fiscal year 1978. In the meantime, as a result of OFCCP's insufficient management information and reporting systems, it is unable to accurately assess the impact of the Executive Order Program on minorities and women. According to an OFCCP staff member, OFCCP's measurement of the impact of the Executive Order Program has been ineffective to date. However, OFCCP will not attempt to improve its measurements until after the new system is in place.[121/]

[120/] Interview with Leonard Biermann, Associate Director, Compliance Agency Division (II), OFCCP, DOL, July 25, 1977.

[121/] Shapiro interview, *supra* note 113.

OFCCP conducted audits of all the compliance agencies from July 1, 1975 to September 30, 1976. OFCCP's national office conducted an additional 6 audits. This is a significant increase from July 1974, at which time OFCCP had reviewed the regional offices of only one compliance agency.[122] In the same period, the national office conducted 321 post compliance review audits and the regional offices conducted 326. Of these, 150 were of supply and service program compliance reviews.[123] Previous to 1974, an inordinate amount of resources had been devoted to the construction program.[124]

OFCCP is not consistent in pointing out deficiencies in agencies' performance. Some of the findings in OFCCP's evaluations of agency performance indicate that it has uncovered a number of problems. For example, in one evaluation reviewed by Commission staff, OFCCP noted that the agency had failed to fully adhere to Revised Order 14 guidelines. Order 14 time frames were ignored and there was no evidence that an extension of time had been requested; conciliation letters had been omitted from the files; and even though "there was evidence that an affected class study should have been made," there was no indication that such a study had been conducted.[125]

A Commission staff review of three OFCCP evaluations of compliance agency performance showed that in all three instances agencies had failed to furnish complete and accurate data on OFCCP report forms. Nonetheless, OFCCP did not criticize the three agencies for this failure. Further, OFCCP did not suggest corrective action in at least one instance of agency failure to comply with other OFFCP requirements. In this instance a performance evaluation demonstrated that an agency was not complying with OFCCP regulations in that it did not issue show cause notices until conciliation failed and it was prepared to initiate a debarment hearing. Further, as OFCCP noted, the show cause notices which the agency did issue were only for blatant violations--the failure of contractors to submit affirmative action plans. Nonetheless, in 1976 OFCCP concluded that the agency had "continued its effective implementation and enforcement of the Executive order during 1976."[126]

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[122] See _Volume V_, _supra_ note 2, at 164.

[123] _Id_. at 266.

[124] Elisburg letter, _supra_ note 53.

[125] OFCCP, Fiscal Year 1976 Annual Performance Evaluation.

The Assistant Secretary of Labor for Employment Standards, Donald Elisburg, has publicly stated that he is committed to back pay as a remedy for past discrimination.[127] From 1969 through 1976 over $60 million in back pay was obtained for affected class members by the Federal contract compliance program.

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[126] OFCCP, Fiscal Year 1976 Performance Evaluation.

[127] DOL, *News*, June 15, 1977.

According to the Department of Labor, the Department of Defense (DOD) was responsible for nearly half of the approximately $60 million secured between 1969 and 1976. (See Exhibit 2-10.)[128] GSA ranked second, having secured over one quarter of the total.[129]

In the last 2 years, the courts have upheld the award of back pay as a remedy under the Executive order.[130] Recently, a Federal court of appeals upheld a consent decree which included a provision requiring American Telephone and Telegraph Company (AT&T) to pay millions of dollars to company employees.[131]

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[128] The exhibit gives a breakdown, by compliance agency of the sum of each back pay settlement won by each of the contract compliance agencies.

An OFCCP study of back pay settlements made between July 1, 1975, and August 31, 1976, shows that during that period alone, over $2.5 million has been awarded to more than 5,000 employees of 129 contractors. Elisburg letter, *supra* note 53.

[129] Between 1969 and 1976, DOD secured over $31 million in back pay, averaging approximately $63.40 for each employee benefitted.

[130] The first case was decided on November 30, 1976, by the U.S. District Court for the Western District of Pennsylvania. The court ruled against a utility company maintaining that there is jurisdiction for back wages. United States v. Duquesne Light Co., 423 F. Supp. 507, (W.D. Pa. 1976).

[131] EEOC, Hodgson and United States v. AT&T Co., Nos. 76-2217, 76-2281, and 76-2285 (3rd Cir., April 22, 1977), aff'g EEOC v. AT&T Co., 506 F.2d 735 (3rd Cir. 1974) aff'g in part and remanding in part 356 F. Supp. 1105 (E.D. Pa. 1973). As of May 23, 1977, DOL reported that the amount due was $150 million to be distributed among 100,000 employees. DOL, *News*, May 23, 1977. However, the final amount and the number of affected employees has not yet been established by the court.

EXHIBIT 2-10
COMPLIANCE AGENCIES RESPONSIBLE FOR BACK PAY AWARDS
1969-1976

AGENCY	AMOUNT
Department of Defense	$31,639,897
General Services Administration	16,385,833
Department of the Treasury	8,622,225
Energy Research and Development Administration	1,685,984
Department of Commerce	1,169,618
Veterans Administration	688,770
Department of the Interior	591,672
Department of Health, Education and Welfare	376,783
Atomic Energy Commission	233,088
Department of Agriculture	56,060
Department of Transportation	1,118

SOURCE: DOL, Office of the Solicitor

Another major back pay settlement which was recently secured by the contract compliance program and EEOC was that of $935,000 for 640 Gulf Oil employees. The company has also agreed to establish goals and timetables to remedy the underutilization of minorities and women through promotion and hiring.[132/]

[132/] DOL, News, July 16, 1976.

V. The Contract Compliance Program for the Construction Industry.

OFCCP has not added to the number of hometown plans or imposed plans since Volume V was written. As of August 1977, these two types of plans continued to be major OFCCP tools for achieving affirmative action in the construction industry.[133] To describe them briefly:[134]

1. Hometown plans are plans voluntarily developed by contractors, unions, and the minority community. Under Part I, bidders who are signatories to the plan are considered in compliance as long as the contractor and labor organizations with which they have collective bargaining agreements meet the goals for minority utilization to which they committed themselves. Under Part II, other bidders[135] also make specific commitments to abide by goals. As of August 1977, there were only 42 hometown plans,[136] although originally 103 areas were targeted for hometown plans.

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[133] OFCCP stated:

> The discussion of OFCCP's construction program does not refer to the proposal published on August 16, 1977. The proposal is intended to correct most of the problems discussed, yet, the report discusses the problems as if the proposal did not even exist. Sept. 9, 1977, Elisburg letter, supra note 1.

The Commission notes, however, that the August 16 proposal is, in fact, discussed at length infra. As of Sept. 30, 1977, this proposal had not been adopted by OFCCP in final form.

[134] Hometown plans and imposed plans are discussed in detail in Volume V, supra note 2, at 343-62.

[135] Part II of the bid conditions apply to those contractors who are not signatories to a hometown plan; are signatories but are not parties to collective bargaining agreements; are signatories but are not parties to collective bargaining agreements with unions which are not signatories; are signatories and are parties to collective bargaining agreements with unions but the two have not jointly executed a specific commitment to goals for minority utilization and incorporated the commitment in the plan; are participating in a plan which is no longer acceptable to OFCCP; or are signatories but are parties to collective bargaining agreements with unions which together have failed to make a good faith effort to comply with their obligations under the plan. OFCCP, New Model Bid Conditions (July 28, 1976).

[136] 42 Fed. Reg. 41378 (Aug. 16, 1977).

2. If groups cannot agree on a voluntary plan, OFCCP may impose a plan. Plans were imposed by OFCCP in seven areas.[137] The requirements of prospective contractors in areas where OFCCP has imposed a plan are similar to those made under Part II of the hometown plans.

137/ These areas are Philadelphia, Pa.; Washington, D.C.; Atlanta, Ga., St Louis, Mo.; San Francisco, Ca.; Camden, N.J.; and Chicago, Ill. As discussed *infra*, OFCCP proposes to eliminate all imposed plans. *Id*.

As of August 1977, compliance with hometown plans continued to be poor. Audits since 1975 showed that only three hometown plans met or exceeded their goal.[138] Moreover, of 29 plans on which OFCCP had readily available and complete data, 17 (58 percent) had met less than 50 percent of their goal. Of those, seven had met less than 20 percent of their goal.[139]

Commission staff reviewed the Pittsburgh hometown plan audit for 1976.[140] The review showed that out of 20 participating trades, 11 did not meet their goals for the 1976 plan year.[141] On November 26, 1976, OFCCP regional office staff notified the parties to the plan that those trades not meeting their goals must provide OFCCP with documentation showing that the trades had taken the steps necessary to prove good faith efforts.[142] When this documentation had not been supplied by March 11, 1977, OFCCP repeated its request. Only one craft ultimately provided all of the information requested.[143] Out of the 11 crafts not meeting their goals, OFCCP regional offices recommended that 7 be placed under Part II of the bid conditions.[144]

138/ Those were the plans in Santa Clara, Ca., and Pasco and Spokane, Wash. Data supplied by OFCCP.

139/ Data supplied by OFCCP.

140/ This plan was randomly selected from the audits available.

141/ Pittsburgh Plan Report--6th Year, May 27, 1977. These trades were: asbestos workers, electrical workers, elevator constructors, ironworkers, operating engineers, painters, plumbers, sheetmetal workers, sprinkler fitters, stone and tile setters, and tile helpers.

142/ There are 12 specific steps to be taken in order to prove good faith efforts and they are contained in the Construction Compliance Manual. ESA, Department of Labor, Operations Manual: Contract Compliance in Construction, Aug. 30, 1976 /hereinafter cited as Construction Compliance Manual/.

143/ Pittsburgh Plan Report (May 27, 1977).

144/ The seven trades recommended for Part II were: asbestos workers, elevator constructors, painters, sheetmetal workers, sprinkler fitters, stone and tile setters, and tile helpers. Id.

In May 1976, OFCCP issued instructions to compliance agencies for the development of "special bid conditions," including goals, for non-plan areas. These instructions address a problem noted by this Commission in Volume V, that construction contractors in non-plan areas had been ignored by the compliance agencies. Special bid conditions are similar to the bid conditions used in hometown plan areas in that they contain goals, timetables, and good-faith effort steps. Compliance agencies were instructed to develop them for those areas not covered by hometown or imposed plans.[145]

Special bid conditions are to be used in high-impact projects in special areas, i.e., areas in which the following conditions exist: 1) the project is of sufficient size and duration to provide significant employment and training opportunity; 2) the project is located in an area of significant minority group population and work force; 3) within the project area the industry shows underemployment of minorities; and 4) the industry has not developed an acceptable approach to provide equal employment opportunity for minorities. Special bid conditions must be approved by the Director of OFCCP. As of mid-1977, 57 special bid conditions had been approved by OFCCP.[146] Most were approved in the latter part of 1976 and early 1977. However, as the Secretary of Labor stated in August 1977, substantial Federal and federally assisted construction continues to be carried out without benefit of specific

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145/ Construction Compliance Manual, Appendix IV. As discussed infra, OFCCP proposes to eliminate special bid conditions. See 42 Fed. Reg. 41378 (Aug. 16, 1977).

146/ Interview with William Raymond, Associate Director, Construction Compliance Division, OFCCP, July 25, 1977.

affirmative action requirements.[147/] For example, data from March 1977 showed that in Region I, covering the States of Maine, Vermont, New Hampshire, Massachusetts, Rhode Island, and Connecticut, only five areas were covered by any type of plan or bid condition.[148/] These areas were: Boston, Berkshire County, and New Bedford (Massachusetts); Rhode Island; and New Haven (Connecticut).

In August 1976, OFCCP issued a manual for compliance agencies detailing the operational procedures they were to follow.[149/] The manual, which became effective on October 1, 1976, outlines the responsibilities of OFCCP's regional office, the contracting agency, and contractors. It contains guidelines for conducting compliance reviews and judging good faith efforts.

In August 1976, OFCCP developed a Monthly Employment Utilization Report (Form 257).[150/] This report replaces the Monthly Manpower Utilization Report (Optional Form 66)[151/] which contractors subject to Part II of the bid conditions, Imposed Plans, or Special Bid Conditions are required to file.

[147/] Proposed 41 C.F.R. § 60-4, Supplementary Information, 42 Fed. Reg. 41378 (Aug. 16, 1977).

[148/] See OFCCP's list of hometown plans, and memorandum from A. Diane Graham, Acting Director, OFCCP, to Heads of All Agencies, May 4, 1977.

[149/] Construction Compliance Manual, supra note 142.

[150/] This form is reproduced in the Construction Compliance Manual, Appendix II, supra note 142.

[151/] See Volume V, supra note 2, at 367-68 for a discussion of Optional Form 66.

Form 257 shows the company's name, the trades covered, total hours worked, hours worked by minorities and women,[152] the ratio of minority work hours to total hours, total number of minority employees, and the total number of employees. Separate data on hours worked are required for the following categories: Black, Spanish American, American Indian, Oriental, and Total Female. Data on minorities are not broken down by sex and data on women are not broken out by race or ethnic origin. This system makes it impossible to determine female utilization by race or ethnic origin. It also results in the double counting of minority women, whose employment must be recorded both as minority and female. Finally, the form provides no means for determining the number of hours worked by white males, which could be useful as a basis for comparison with minority and female utilization.

The Commission criticized the previous Form 66 because it did not show the total number of minority employees in the contractor's work force as a whole, but merely the number of hours worked by those employees. Form 257 corrects this problem. However, data on women is provided only by work hours and not by the number of female employees in the construction work force as a whole.

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[152] Although there are not yet goals for women, by revising the monthly utilization report to include female utilization, OFCCP expects to be able to determine the extent of female availability in construction trades.

In August 1977, DOL proposed to consolidate and standardize requirements for construction contractors and subcontractors subject to Executive Order No. 11246.[153/] DOL had identified a number of deficiencies in its current approach to the construction trades. In addition to the failure of the Government to require affirmative action on many Federal and federally assisted contractors, DOL has observed that:

> - Contracting officers are confused by the different affirmative action requirements and sometimes do not know which ones cover which areas or which projects.
>
> - If a compliance agency neglects to develop special bid conditions for a project, the project is not covered by an affirmative action plan.[154/]

[153/] 42 *Fed. Reg.* 41378 (Aug. 16, 1977). The Assistant Secretary for Employment Standards wrote to this Commission:

> It would also seem appropriate that where feasible, the report should devote adequate attention to those measures under consideration for transforming the program into a more firmly based EEO contract enforcement institution which is both more effective and more efficient. Such attention becomes doubly important in those instances in which the report cites inherited deficiencies in those two respects. Sept. 6, 1977, Elisburg letter, *supra* note 1.

This report reflects measures DOL was considering for improving the contract compliance program through the end of August 1977. In addition, information provided by the Department of Labor in the September 6 and 9 letters from the Assistant Secretary for Employment Standards has been incorporated into this chapter.

[154/] *Id.*

As a result, OFCCP proposed new regulations which would eliminate Imposed Plans and Special Bid Conditions and in their place substitute:

- A new notice to be included in all solicitations of Federal and federally assisted construction contracts containing goals for minority and female participation, by construction trade, for the geographic area in which the contract is to be executed.

- A new clause in all non-exempt construction contracts[155] containing the specific affirmative action standards each construction contractor and subcontractor would be required to undertake. These steps include requirements for recruitment, test validation, and dissemination of an equal employment opportunity policy.[156]

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[155] Exemptions from the equal opportunity clause are discussed in Section I, Regulations, supra. The new clause will be used in addition to the standard equal opportunity clause. 42 Fed. Reg. 41380-81 (Aug.16, 1977).

[156] Id.

In 1977, as in 1975, one of the major criticisms of the construction compliance program continues to be that underutilization of women in the construction trades persists.[157] However, until recently, DOL's actions had not been fully responsive to the issue. As of August 1977, the only OFCCP requirement to address the problem of sex discrimination in construction work was an instruction to regional staff that hometown plans must include a statement indicating that women will be afforded equal opportunity in all areas of employment.[158] Further, in at least one instance, a hometown plan was submitted to OFCCP which contained goals for women,[159] and OFCCP rejected the goals on the grounds that OFCCP did not yet have a policy covering such goals.[160] In August 1977, DOL proposed goals for female participation in the construction trades.[161] While these goals are low, the establishment of goals for women in construction would be a positive step forward.[162] These goals were published in the form of proposed regulations which would require each construction contractor to set a goal of 3.1 percent of its work force for the hiring of women during the first year the regulations take effect. For the second year, a goal of 5.0 percent would be set and for the third year, 6.9 percent.[163]

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[157] For a discussion of the problem see 42 Fed. Reg. 41383 (Aug. 16, 1977). This discussion is based upon a variety of sources of information, including OFCCP hearings on the subject in Baltimore, Maryland, in October 1975. See also testimony of the Compliance Task Force of the National Organization of Women Before the OFCC Factfinding Hearing on the Construction Contract Compliance Program, Oct. 17, 1975, and *Volume V*, *supra* note 2, at 345.

[158] This statement is discussed in *Volume V*, *supra* note 2, at 345.

[159] Beginning in 1974, Alaska set goals, for each craft, for women to work on the Alaskan pipeline. In 1974, the goals ranged from a low of 5.45 percent to a high of 7.05 percent; 1975, 6.45 percent to 7.62 percent; 1976, 7.17 percent to 7.88 percent; and in 1977, 8 percent for all crafts. The goals were established only for work on the pipeline and not for other construction. Telephone interview with Margaret Johnson, Equal Opportunity Specialist, Construction Compliance Division, OFCCP, Sept. 28, 1977.

[160] Telephone interview with Margaret Johnson, Equal Opportunity Specialist, Construction Compliance Division, OFCCP, Aug. 24, 1977.

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[161] 42 Fed. Reg. 41383 (Aug. 16, 1977).

[162] In addition to the proposed regulation to establish goals for women, the Bureau of Apprenticeship and Training, DOL, has funded two apprenticeship outreach programs exclusively for women: Better Jobs for Women in Denver and Women-in-Apprenticeship in San Francisco. The Department of Labor has reported that apprenticeship is a significant source of skills in those trades that are the most mechanically demanding. U.S. Department of Labor, Employment and Training Administration, 1976 Employment and Training Report of the President, at 75. However, as noted in that report "apprenticeship provides a means of entry for only a fraction of all building trades workers". Id. at 82.

[163] The goals were published in response to two lawsuits against the Secretary of Labor asking that hiring goals be established for [illegible]truction projects. Advocates for Women v. Marshall, No. 76-0862 [illegible]., filed May 14, 1976) and Women Working in Construction, No. 76-527, (D.D.C., filed Apr. 13, 1976). See also The N.Y. Times, Aug. 21, 1977, Sect. 3, p. 15.

As OFCCP stated:

> These goals would apply to a covered contractor's or subcontractor's entire work force which is working on construction projects in an area covered by the goal.... The goal would apply to the contractor's entire work force in that area notwithstanding that not all employees would be working on the Federal or federally assisted construction project.[164]

The following are problems with the proposal which indicate that the goals OFCCP has set are low:

1. The goals OFCCP proposes were established on the basis of existing participation, which is very low,[165] rather than on the basis of potential participation if barriers to women were eliminated.[166]

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[164] 42 *Fed. Reg.* 41383 (Aug. 16, 1977).

[165] For example, the League of Women Voters stated:

> ...it is unfortunate that the statistics on which the goals are based, the percentage of women in the construction industry and percentage of women in craft and kindred jobs, are both out-of-date and themselves reflective of historic discrimination. Thus, the level of the goal set out in the proposed regulation is the absolute minimum which would be useful and meaningful....Attachment to letter from Trudy B. Levy, Staff Attorney, Litigation Department, League of Women Voters Education Fund, Comments on Proposed OFCCP Regulations on Women in Construction, Sept. 17, 1977 /hereinafter referred to as Levy letter/.

OFCCP estimates that women constitute 1.2 percent of the experienced construction labor force and 5 percent of the experienced labor force in craft and kindred occupations. 42 *Fed. Reg.* 41379 (Aug. 16, 1977).

[166] A study at Stanford University showed that twice as many women expressed interest in construction work when they were presented with recruitment literature announcing that goals for female hiring had been established than when this announcement was absent from the recruitment literature they received. OFCCP stated, "Goals for women in construction are designed to create movement and therefore must relate to actual employment and to those who may be employable rather than to those who have expressed interest." Sept. 9, 1977, Elisburg letter, *supra* note 1.

2. OFCCP has proposed only one set of goals to apply nationwide. Separate goals have not been proposed for separate geographic areas, although participation of women in construction varies from area to area.[167] The National League of Women's Voters noted that:

> ...where local goals are higher than the national one, the federal goal in those local areas should match the local one. When a higher local goal has been adopted it creates a qualified labor pool of potential women applicants, yet federal contractors will not voluntarily employ women in those areas at a level comparable to the local goal level unless the federal goal is as high as the local goal. Thus women in those areas will not be afforded equal employment opportunity without the increased federal goal.[168]

3. OFCCP has proposed only one set of goals for construction work as a whole. It has not proposed separate goals for each trade although participation of women varies from trade to trade. (OFCCP notes, however, that the goals it proposes are to be applied by contractors separately to each craft and not to the contractor's work force as a whole.)[169]

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[167] Women's participation in construction varies by area. According to The New York Times, some west coast areas had set local goals for women as high as 12 percent. The New York Times, Aug. 21, 1977, Sec. 3, p. 15.

[168] Levy letter, *supra* note 165. This view is also held by the National Urban League. Telephone interview with Gloria Parker, National Urban League, Sept. 27, 1977.

[169] Sept. 9, 1977, Elisburg letter, *supra* note 1.

As a result of the latter two deficiencies, OFCCP's proposed goals are lower than female participation in some trades in some geographic areas. For example, in 1974 in California, 11.1 percent of the membership in referral unions for electrical workers were women; in Ohio, 13.3 percent of the membership in referral unions for painters were women.[170]

Despite these criticisms, OFCCP's proposal is a major step forward. In the absence of goals, participation by women in the construction industry has been low. The proposed regulations constitute serious attention by OFCCP to the problem of underutilization of women in the construction trades.

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[170] EEOC, Minority and Female Membership in Referral Unions, 1974.

VI. Sanctions

Between the time that Volume V was written and August 16, 1977, five contractors had been debarred. Two of these debarments took place in August 1977. As shown in Exhibit 2-11, the five debarred contractors were: Stillwater, Inc., Timken Roller Bearing Co., Powertherm Corporation, Ingersoll Milling Machine Co., and Anastasi Brothers. Two additional contractors, Loffland Brothers; and Hahn and Clay, Machine and Boilerworks, Inc., were awaiting an administrative law judge's decision and a final administrative determination by OFCCP.[171]

As of July 1977 another six contractors were awaiting administrative hearings. Those contractors are: Kerr Glass Manufacturing Corporation; Owens-Illinois, Inc., Uniroyal, Inc.; Honeywell, Inc.; the National Bank of Commerce, San Antonio, Texas; and Warner and Swasey Company, a Pennsylvania manufacturer.[172] Three of the actions awaiting administrative hearings were filed in 1977.[173] The Deputy, Director of OFCCP informed Commission staff that the small size of the staff in the Solicitor's Office impeded OFCCP's ability to take enforcement action. According to the Deputy Director, both the volume of cases and the sophistication of Federal contractors place heavy demands on the Solicitor's office.[174]

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[171] Information supplied by James Henry, Associate Solicitor for Labor Relations and Civil Rights, DOL, July 1977.

[172] *Id*.

[173] Sept. 9, 1977, Elisburg letter, *supra* note 1, at 7.

[174] Devine interview, *supra* note 114.

Exhibit 2-11

Company Debarred, Location, Type of Contract, and Compliance Agency

Company	Geographic Location	Type of Contract	Date of Debarment	Date of Reinstatement	Compliance Agency
Stillwater, Inc.	Goshen, Va.	Supply and Services	Feb. 3, 1975	May 23, 1975	DOD
Timken Roller Bearing	Canton, Ohio	Supply and Services	Mar. 6, 1976	May 6, 1976	DOD
Powertherm	Philadelphia, Pa.	Construction	Aug. 11, 1976	None	HEW
Ingersoll Milling Machine Co.	Rockford, Ill.	Supply and Services	Aug. 1, 1977	None	DOD
Anastasi Bros.	Philadelphia, Pa.	Construction	Aug. 16, 1977	None	HEW

SOURCE: OFCCP

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In addition, DOL has referred six cases to the Department of Justice (DOJ) for enforcement action: New Orleans Public Service Inc., Mississippi Power and Light, Colorado Fuel and Iron, Crown Zellerbach, Kentucky Utility Company, and Duquesne Light Co.[175/] The utility companies were referred to DOJ because it is the opinion of the Solicitor's Office that contracts with utility companies cannot be refused or terminated because of the essential nature of their services to the public. Thus, one of the Government's goals with respect to these contractors is to get them to live up their obligations under the Executive order, rather than to debar them or terminate their contracts.[176/]

[175/] Sept. 9, 1977, Elisburg letter, supra note 1, at 7. DOL stated that there are "numerous" other cases being handled by DOJ which include Executive order counts. Id.

[176/] Interview with James Henry, Associate Solicitor for Labor Relations and Civil Rights, DOL, July 20, 1977. DOL noted that in addition, "The Government's goal with respect to these contractors is to obtain backpay and other appropriate remedies for persons protected by the Order...." Sept. 9, 1977, Elisburg letter, supra note 1.

The Assistant Secretary of Labor for Employment Standards, Donald Elisburg, has issued a public statement that the "ultimate goal of the contract compliance program is to seek voluntary compliance," but that the Department is committed to "appropriate action" against contractors which refuse to comply with Executive Order No. 11246 and its implementing regulations.

DOL News Release, June 15, 1977. Mr. Elisburg stated, "We would much rather have a contractor agree to conciliation than lose its government contract." Id. In addition to enforcement through sanctions, OFCCP has directed conciliation for the award of back pay to remedy discrimination against affected classes. These awards for back pay are shown in Exhibit 2-10, supra, and are discussed in the text adjacent to that exhibit.

In that statement, Mr. Elisburg summarized the Department of Labor's recent efforts to enforce the Executive order. He stated:

> In addition, on June 15, 1977, I stated that "equal employment opportunity programs are a high priority" of the Labor Department. In this regard I pointed out that the Labor Department's enforcement of EO 11246 has reached the highest point since the executive order was issued in 1965, with six companies having debarment actions pending, four contractors awaiting debarment decisions, 13 companies having been debarred, and several contractors facing imminent debarment proceedings. I also noted that two suits filed under the executive order are currently pending in district court; three cases are awaiting decision in the courts of appeal; and at least 12 cases are now under review by the Labor Department for possible litigation. Sept. 6, 1977, Elisburg letter, supra note 1.

However, past failures to enforce the Executive order continue to cause problems for DOL. At least one agency has had several requests for hearings pending at DOL since 1976[179] and DOL is being sued, along with HEW, for failure to carry out duties to enforce the affirmative action and nondiscrimination requirements imposed on Federal contractors by Executive Order 11246.[180] One OFCCP official called the case "as solid as a rock." The two agencies are trying to settle rather than contest the case. As a result of the suit, OFCCP issued directions to the compliance agencies to clarify compliance review procedures "to insure that reviews result in either enforcement actions for noncompliance or conciliation agreements to achieve compliance."[181] In addition, HEW must submit a program plan to the court by August 1, 1977, which describes how it intends to delegate resources to the Executive Order Program.[182]

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[179] The Veterans Administration has had six such requests pending since 1976. Telephone interview with Sandra Robinson, Deputy Director of Contract Compliance, VA, Aug. 19, 1977.

[180] Women's Equity Action League v. Weinberger, No. 74-1720 (filed Nov. 26, 1974).

[181] The thrust of the memoranda was to instruct the agencies to issue show cause notices when reviews indicated the need, or to enter into "binding," i.e., written, conciliation agreements which, if violated would be grounds for giving notice of hearing without first having to issue a show cause notice. Telephone interview with Robert Gelerter, Program Analyst, OFCCP, Aug. 24, 1977.

[182] Interview with Leonard Biermann, Associate Director for Division II, OFCCP, DOL, July 25, 1977.

Chapter 3

DEPARTMENT OF LABOR (DOL) WAGE AND HOUR DIVISION (WHD)

EQUAL PAY ACT ENFORCEMENT

I. Responsibilities

As of July 1977, there had been no legislative changes in the coverage of the Equal Pay Act (EPA)[1] since the Fair Labor Standards Amendments of 1974 (FLSA).[2] Thus, the act still requires that employees performing equal work must be paid equal wages, regardless of sex, and applies to employees who are engaged in commerce or in the production of goods for commerce, or who are employed in an enterprise in which at least two individuals are engaged in commerce, producing foods for commerce or handling goods which have moved in commerce.[3] The enterprise must have an annual gross volume of sales made or business done of not less than $250,000.[4] The act also applies to State and local Government employees[5] and to professional, technical, administrative, and academic employees.[6]

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[1] 29 U.S.C. § 206(d)(1) (Supp. V, 1975).

[2] 29 U.S.C. § 203(x) (Supp. V, 1975).

[3] 29 U.S.C. § 206(a)(1) (Supp. V, 1975).

[4] Letter from Donald Elisburg, Assistant Secretary, Employment Standards Administration, Department of Labor, to Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights, July 30, 1977 [hereinafter referred to as Elisburg letter]. There is no annual dollar volume test for certain enterprises, including laundries, construction firms, hospitals, nursing homes, schools, and preschools. Letter from Donald Elisburg, Assistant Secretary, Employment Standards Administration, Department of Labor, to John A. Buggs, Staff Director, U.S. Commission on Civil Rights, Aug. 26, 1977 [hereinafter referred to as Elisburg comments].

The EPA gives DOL three broad enforcement powers: to investigate possible violators of the law, negotiate a settlement where a violation is found, and litigate where efforts to secure compliance have failed.[7] As the Commission noted in 1975, in some ways the EPA provides stronger protection for employees than Title VII of the Civil Rights Act of 1964.[8] Under EPA:

- Employees may sue without providing notice to the Department of Labor, exhausting DOL administrative remedies, or even filing a complaint.
- Employees or the Secretary of Labor may file suit for "liquidated damages" as well as back wages.
- The statute of limitations is two years, or three years in the case of willful violations.

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[5] 29 U.S.C. § 203(x) (Supp. V, 1975). This coverage was established in 1974 when the EPA was amended to include State and public employees. The Civil Service Commission is responsible for enforcing the Equal Pay Act for Federal employees. See Section III of this chapter, infra, for a detailed discussion of the statutory coverage of the EPA and FLSA as a result of the amendments.

[6] 20 U.S.C. §§ 1681-86 (Supp. V, 1975). Title IX of the Education Amendments of 1972 amended the EPA to include professional, technical, administrative, and academic workers who were previously exempt from coverage.

[7] 29 U.S.C. § 211 (Supp. V, 1975).

[8] 42 U.S.C. § 2000e (Supp. V, 1975). Differences between Title VII and the Equal Pay Act are discussed at greater length in The Federal Civil Rights Enforcement Effort--1975, Vol. V, To Eliminate Employment Discrimination 407-17 (July 1975) [hereinafter referred to as Volume V].

The Equal Pay Act continues to be generally narrower than Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on race, religion, national origin, sex, or color.[9] Unlike Title VII, the Equal Pay Act does not:[10]

- Permit complaints from applicants. EPA is restricted to employees;
- Cover failure to hire or promote because of sex or prohibit the use of sex as an occupational qualification;
- Require employers to take actions to correct the effects of past discrimination except for the requirement that back wages be paid; and
- Prohibit discrimination based on race, religion, national origin, or color.

Moreover, the Equal Pay Act exempts a number of types of employees[11] not specifically mentioned as exemptions in Title VII, including:

- Employees of the recreation industry;
- Segments of the fishing industry;
- Employees of small retail or service establishments which are not part of a chain;
- Certain agricultural employees; and
- Employees of small circulation newspapers.

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[9] 42 U.S.C. § 2000(e) (Supp. V, 1975).

[10] The limitations of the Equal Pay Act are discussed at length in Volume V, supra note 8, at 407-17.

[11] If these employees work for employers with 15 or more employees, they are, however, protected by Title VII, 42 U.S.C. § 2000e (Supp. V, 1975). DOL stated, however, that:

> As of September 1976, an estimated 75 million workers were covered under the Equal Pay Act. In addition, certain exempt employees are also not covered under Title VII in that they are employed by employers having less than 15 employees. Elisburg comments, supra note 4.

In National League of Cities v. Usery[12] the Supreme Court held that the minimum wage and overtime provisions of the Fair Labor Standards Act[13] cannot constitutionally be applied to State and local government employees engaged in "areas of traditional governmental functions."[14] After that decision many of the State and local government defendants in pending suits under the Equal Pay Act sought to have those suits dismissed on similar grounds, but they were unsuccessful. As of July 1977, 27 United States district courts, as well as the only court of appeals to rule on the issue,[15] had determined that application of the Equal Pay Act to government employees is constitutional.[16] Thus, the holding in National League has not been extended to the Equal Pay Act.

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[12] 426 U.S. 833 (1976).

[13] 29 U.S.C. § 203(x) (Supp. V, 1975).

[14] 426 U.S. 833 (1976).

[15] Usery v. Allegheny County Institution District, 544 F.2d. 148 (3d. Cir., Oct. 28, 1976), cert. denied, Mar. 28, 1977, 97 S. Ct. 1582 (1977). In Usery v. Allegheny, the question of the application of the EPA requirements over State governments, in view of National League, was raised. The United States Supreme Court's refusal to hear the case is interpreted by DOL to mean that its EPA jurisdiction with respect to State governments is unaffected by National League. Moreover, in another recent decision, Usery v. Charleston School District of Charleston City, South Carolina, No. 76-2340 (4th Cir. July 25, 1977), the court also ruled that the principle of National League was not applicable with respect to the enforcement of the Equal Pay Act. Interview with Carin Ann Clauss, Solicitor of Labor, DOL, July 21, 1977.

[16] Elisburg letter, supra note 4.

II. Organization and Staffing

A. Washington Office

As of July 1977, there had been no changes since the Commission's last review of the Equal Pay Act enforcement in the size or organizational structure of the Wage Hour Division (WHD) and no structural changes within the Employment Standards Administration (ESA) which would affect WHD. The salient features of DOL's organization of EPA enforcement continue to be:

- The Employment Standards Administration, headed by an Assistant Secretary, is to be responsible for the administrative enforcement of the EPA. [17]
- The Wage and Hour Division of the ESA, under the direction of the Wage and Hour Administrator, is responsible for setting policies and procedures for the enforcement of the FLSA and predetermining wage rates for Federal contracts.
- The Employment Standards Administration has 10 regional offices, headed by Regional Administrators. Each regional office is responsible for overseeing several area offices, where enforcement activities take place.
- Lawsuits filed by DOL to enforce the FLSA are prosecuted by the Office of the Solicitor. The Solicitor reports directly to the Under Secretary of Labor and is not accountable to the Assistant Secretary for Employment Standards or the Wage and Hour Administrator.

17/ The following other units are also part of the Employment Standards Administration: The Office of Federal Contract Compliance Programs; the Women's Bureau; and the Office of Workmen's Compensation Programs.

Although there have been no formal organizational changes with respect to the relationship between the Assistant Secretary of Employment Standards Administration and the Administrator of the Wage and Hour Division, there is an unofficial change which provides increased authority to the Wage and Hour Administrator and thus may facilitate enforcement of the Equal Pay Act. Formerly, the Administrator had to seek approval for management control over regional staff from the Assistant Secretary.[18/] Under the present Assistant Secretary of ESA, the Administrator is expected to exercise a great deal of autonomy in dealing with regional office staff, for example, assuming the role previously held by the Assistant Secretary of approving WHD regional staff recommendations for appointments of certain regional staff.[19/] However, the written instructions explaining

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[18/] Volume V, supra note 8, at 425.

[19/] Interview with Donald Elisburg, Assistant Secretary, Employment Standards Administration, DOL, July 21, 1977. Interview with Francis McGowan, Acting Director, Division of Enforcement Policy and Procedures, Department of Labor, July 21, 1977.

the delegation of authority from the Assistant Secretary of Employment Standards to other ESA officials does not reflect this change in procedure.[20/]

B. Field Offices

The Department of Labor has partially adopted the Commission's recommendation that the Administrator utilize special field representatives to monitor and inspect all activities of regional and area offices on a continuing basis. DOL reports that it is staffing seven new positions in regional offices. The individuals who fill these positions will monitor enforcement activity at the area office level in the various Wage Hour programs including the equal pay program. In addition, accountability review teams consisting of Wage Hour Division national office staff visit Wage Hour regional and area offices periodically to assess program performance.[21/]

DOL has also adopted the Commission's recommendation that DOL should assign at least one senior level official to each regional office whose sole responsibility would be enforcement of the Equal Pay Act. That staff person would not only conduct investigations but would also provide assistance to other regional and area office personnel working on

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[20/] Memorandum from Donald Elisburg, Assistant Secretary, Employment Standards Administration, DOL, to all ESA National Office Program Heads and ESA Regional Administrators, May 12, 1977.

[21/] Elisburg letter, *supra* note 4.

EPA.[22] As of July 15, 1977,[23] there were 27 regional Equal Pay/Age Discrimination in Employment Act (EP/ADEA) specialists positions being staffed, 21 of which were on board. According to DOL, the duties of these specialists include serving as teamleaders on complex, multi-unit EPA investigations;[24] providing technical assistance to compliance officers (COs) on EPA matters; arranging for close liaison with the regional solicitors in regard to EPA litigation; and working with the area directors and assistant regional administrators on EPA program planning and direction.[25]

The workload of the Wage and Hour Division continues to be greater than the Division can handle. DOL reported that there has been a 6 percent increase in the number of compliance officers in the Wage and Hour Division area offices, from 979 on September 30, 1974, to 1,039 as of June 30, 1977. In June 1977, 86 staff members were at the GS-13 level; 597 at the GS-12 level; 86 at the GS-11 level; 118 at the GS-9 level, 109 at the GS-7 level; and 43 at the GS-5 level.[26] However, the workload has increased even more rapidly. In fiscal year 1974, WHD received 43,760 complaints, and at the end of that year had 10,271 complaints awaiting investigation.

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[22] Id.

[23] Id. In 1977 EP/ADEA specialists spent as much as 50 percent of their time on EPA enforcement matters. Interview with Robert F. Blair, Director, Office of Personnel Employment Standards Administration, DOL July 15, 1977.

[24] See Section V, infra, Administrative Enforcement, for a further discussion of multi-unit investigations.

[25] Elisburg letter, supra note 4.

[26] Id.

DOL estimates that in fiscal 1978 it will receive 57,800 complaints and will have on hand 33,900 uninvestigated complaints at the end of that year.[27/]

As in the past, advocacy groups continue to be greatly concerned with the lack of female representation in the EPA program, designed to protect the rights of women.[28/] These groups criticized the lack of female COs, claiming that the predominately male-dominated WHD staff is not fully receptive to female complainants under EPA. Only about 16 percent of the COs are women and only about 3 percent are minority women.[29/] As of June 30, 1977, there were only four female EP/ADEA specialists and one female regional administrator.[30/]

[27/] Supplemental Appropriation, Fiscal Year 1977: Hearings Before the House Subcommittees of the Comm. on Appropriations, 95th Cong., 1st Sess., 679 (1977). (Statement of Warren D. Landis, Acting Wage and Hour Administrator).

[28/] These groups include the National Organization for Women and the Women's Equity Action League.

[29/] Telephone interview with Agnes Robinson, Office Management Assistant, WHD, ESA, DOL, Aug. 8, 1977.

[30/] Elisburg comments, *supra* note 4. In a comparable job position, equal opportunity specialist, women represent 35 percent of the incumbents. Bureau of Manpower Information Systems, U.S. Civil Service Commission, Central Personnel Data File Report, May 31, 1976.

III. Policies

As this Commission observed in 1975, the Department of Labor guidance concerning the Equal Pay Act through its Interpretative Bulletin (IB) [31] and Field Operations Handbook (FOH) is so inadequate that it has effectively prevented employers from complying with the law. As of July 1977, these instructions had not been revised. Thus, DOL guidance continues to:

- Reflect major differences with the Equal Employment Opportunity Commission. 32/

31/ The section in the Code of Federal Regulations explaining the Department of Labor's equal pay enforcement policies is entitled, the "Interpretative Bulletin"[29 C.F.R. §§ 800.00-800.166 (1976)]. According to DOL,the Interpretative Bulletin "set forth basic principles regarding the Act's requirements and exceptions" and "has been heavily relied on by the Courts in numerous decisions interpreting the Act's application to particular cases." Elisburg letter, supra note 4.

32/ See, for example, the discussion infra this section on pensions. DOL stated:

> The differences which exist between our Interpretations and instructions to our enforcement staff and those of the Equal Employment Opportunity Commission necessarily result from the differences in the scope of the Equal Pay Act and Title VII. The Equal Pay Act is concerned with sex discrimination in the payment of wages for equal work. Elisburg comments, supra note 4.

Both Title VII and EPA prohibit sex discrimination in the payment of wages for equal work, although Title VII extends to the prohibition of sex discrimination in employment practices generally. The differences noted in this chapter between DOL and EEOC interpretations and instructions as, for example, with regard to pensions, pertain to prohibiting sex discrimination in the payment of wages for equal work, and thus DOL's observation does not negate the Commission's criticism of DOL's regulations and instructions.

- Omit necessary explanation as to how the 1972 and 1974 amendments apply to employers. 33/

- Omit definitions of merit and seniority systems which explain the essential elements of such systems. It is important that these terms be fully defined because the EPA and the IB provide that **unequal** pay may be permissible where such systems are in use. 34/

33/ The Department of Labor has stated that the basic principles regarding the Equal Pay Act's requirements and exceptions set forth in the IB:

> ...are as generally applicable to the numerous types of professional jobs covered by the Education Amendments of 1972 as to the many blue-collar jobs covered since 1964; thus, although the 1972 extension of the Act raises new issues, such as the value of educational degrees from prestigious private institutions as opposed to those from public institutions in comparing faculty jobs, the Secretary believes that the general principles applicable to such situations can be gleaned from the I.B. and past Court decisions. Elisburg letter, supra note 4.

34/ DOL stated:

> Interpretative Bulletin Section 800.144 explains our position with regard to exceptions from the Act's prohibitions for a merit or seniority system. This general guidance is accurate with respect to our position in these areas but certain revisions which will expand this section are now in process. Elisburg comments, supra note 4.

DOL did not indicate, however, whether the revisions would include explanations of the essential elements of merit and seniority systems.

> - Permit part-time workers, the majority of whom are female, to be paid lower wages than full-time workers. 35/

DOL informed this Commission that:

> We have completed in draft stage major revisions of the Field Operations Handbook and Interpretative Bulletin Part 800. It is expected that these drafts will be cleared and be ready for publishing by the fall of 1977. To the extent that there are still differences between DOL and EEOC, it is expected that these differences can be resolved in the near future. 36/

However, as of July 1977, DOL officials believed that these revisions were still in such rough form that it would not be productive to share them with Commission staff. Moreover, it would appear that DOL still did not intend that the revisions would fully explain the principles in the 1972 and 1974 amendments to the Equal Pay Act and that DOL was not fully accepting the responsibility implicit in the fact that courts assign

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35/ DOL responded:

> The mere designation "part-time" has little significance for equal pay purposes. The Act would permit the payment of lower wages to employees who work half, or less than half, of the full-time workers' hours (usually twenty or less) but other employees who may work twenty-five or thirty hours per week would not be included in the exception for "part-time" workers (as the Interpretative Bulletin makes clear). Also as indicated in the Field Operations Handbook, the payment of higher wages to some part-time workers of one sex would indicate that any wage differential between "part-time" and full-time workers was not, in fact, based on the difference in working time (which the Interpretative Bulletin states must be the basis for a wage rate differential between part-time and full-time workers.) Elisburg comments, supra note 4.

36/ Elisburg letter, supra note 4.

great weight to Federal agencies' interpretations of the laws they are required to enforce. 37/

Concerning its existing rules, DOL has stated:

> Employment which was brought within the purview of the Equal Pay Act in 1972 and 1974, does not differ in terms of the Act's requirements for employment previously covered. A note on the expansion of coverage is printed on the Interpretative Bulletin. The Field Operations Handbook also explains the facts concerning this additional coverage. The basic guidance contained in these publications is, in our view and in the view of the Courts, still correct although some minor revisions are needed which are now in process. 38/

37/ Skidmore v. Swift, 323 U.S. 134, 140. In Skidmore v. Swift, the court went on to say in its holding that:

> [T]he weight of such a judgment in a particular case will depend upon the thoroughness evident in its [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control. Id.

See also Griggs v. Duke Power Co., 401 U.S. 424 (1971).

38/ Elisburg comments, supra note 4. It is true that both the IB and FOH expanded coverage of the Act. However, they fail to provide specific guidance concerning the evaluation of academic positions. The EPA requires that job evaluations be based on the factors of skill, effort, and responsibility. Neither the FOH nor the IB provide specific guidance as to what aspects of academic employment are to be included or excluded in making such determinations. The FOH, for example, merely cautions COs that there are few specific precedents in applying EPA principles to academic employment. It does not discuss these precedents. However, for other types of employment, such as bank teller, office employee, factory order clerk, material cutter, janitor, factory inspector, specific guidance and examples are provided in the IB and/or the FOH explaining how to apply these three factors. Many of the examples discuss weight lifting requirements, manual dexterity, and skills required in specific job classifications. Portions of the FOH and the IB concerning academic employees do not provide such specific guidance and, in the case of the FOH, discuss procedural matters only, such as what forms to use and who to notify when a compliance review is conducted.

Moreover, DOL also commented that "...some of these issues are best resolved in the context of full factual development in court cases now pending, or in response to detailed requests for opinion letters, which are regularly published in the labor services." 39/

39/ Elisburg letter, *supra* note 4.

A. Pensions

Equal Pay Act regulations continue to permit employers to offer discriminatory pension plans--plans which provide smaller payments to women than to men when both have received equal pay during their working years. Under Equal Pay Act regulations, all payments made by an employer to or on behalf of an employee are considered to be wages.[40] DOL has specified that the requirements of that Act are satisfied if an employer's contributions to a pension plan are equal or if the benefits are equal. In other words, if an employer makes equal contributions to a pension plan, it makes no difference under the Equal Pay Act regulations if the end result is sex discrimination through the payment of unequal benefits.

The EPA regulations are weaker than EEOC guidelines.[41] According to EEOC guidelines, all employees must receive the same benefits[42] and the fact that a plan pays men and women different rates would be a *prima facie* case of sex discrimination.

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[40] 29 C.F.R. § 800.110 (1976).

[41] 29 C.F.R. § 1604.9(f) (1976).

[42] DOL disagrees. It stated:

> In our view, it is not accurate to characterize our position with respect to pension plans as "weaker" than that stated in EEOC guidelines nor do we agree that the Equal Pay Act would permit "sex discrimination" to occur in this area. Elisburg comments, *supra* note 4.

The EPA regulations also do not reflect the position which the Department of Labor, itself, perceives to be the most equitable. DOL, along with other member agencies of the Equal Employment Opportunity Coordinating Council,[43] has asserted that "it is a matter of sound public policy that periodic payments made to retired employees pursuant to the terms of employee benefit plans should not reflect a differentiation based on sex."[44] DOL concurs with the other members of the Council that "employees who have received equal pay and status during their working years ought to be assured of an equal income during retirement."[45] The reason that DOL's regulation does not require what DOL believes should be sound public policy is that DOL believes that Congress has not made its position completely clear in existing statutes.[46]

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[43] The Coordinating Council is discussed in detail in Chapter 6, infra.

[44] Attachment to letter from Harold R. Tyler, Jr., Deputy Attorney General, to President Gerald R. Ford, Apr. 15, 1976.

[45] DOL commented:

> The matter of determining a sound public policy with respect to pension plans is a complex one and it was recognized as such by the previous administration which referred the question to the Equal Employment Opportunity Coordinating Council for resolution. The Council (excluding the EEOC) recommended that, because Congress did not make its intent with regard to this issue completely clear in existing statutes, new legislation which would require the equalization of periodic retirement benefits for men and women was called for. The matter is currently under study in the Department of Labor under the direction of Secretary Marshall. Elisburg comments, supra note 4.

[46] Id.

The principal argument advanced in favor of the Department of Labor's position as articulated in the EPA regulations has been cost--women tend to live longer than men and if they are provided with periodic benefits equal to that of men, it will cost more to the companies providing the pension plans.[47] However, cost has never been permitted to justify an employee practice which has an adverse impact on a protected class. The only permissible defense is "business necessity," narrowly defined in *Robinson* v. *Lorillard*[48] as "safe and efficient" operation of the business. No such argument can be made in the case of pensions.

B. *Pregnancy*

The Equal Pay Act regulations do not contain a policy concerning the use of leave for maternity purposes. It is the position of the Department of Labor that if an employer were to deny the opportunity to take accrued paid sick leave to a pregnant employee who was physically unable to work, this would be a violation of the Equal Pay Act.[49] This policy is consistent with EEOC guidelines.[50] However, this policy has not been articulated to the public. It does not appear in the Interpretative Bulletin or the Field Operations Handbook.

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[47] See, for example, memorandum from Gwendolyn Gregory, Director, Office of Policy Communication, Office of the Secretary, Department of Health, Education, and Welfare, to the Acting Director, Office for Civil Rights, Department of Health, Education, and Welfare, "Sex Discrimination in Pension Benefits," Aug. 25, 1975.

[48] 444 F. 2d 791, *cert. denied*, 404 U.S. 1006 (1971). The test as enunciated in Robinson is:

> /W/hether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact. *Id*. at 798.

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[49] Interview with Carin Ann Clauss, Solicitor of Labor, DOL, July 21, 1977.

[50] 29 C.F.R. § 1604.10 (1976).

C. Training

DOL regulations continue to provide inadequate guidance to employers concerning training programs offered only to members of one sex. DOL regulations contain a lengthy section on training programs which asserts that if wages received by employees in training are unequal to those nontrainees doing the same work, there may be no violation of the Equal Pay Act.[51/] The regulations also state that "Training programs which appear to be available, only to employees of one sex will... be carefully examined to determine whether such programs are, in fact, bona fide."[52/] The regulations, however, do not prohibit the exclusion of employees of one sex from any training course. They do not state that employers would be justified in such an exclusionary policy only if sex were a bona fide occupational qualification for the position for which the employees were being trained or where an effort was being made to overcome the effects of past discrimination.

[51/] The regulations state:

> Employees employed under a bona fide training program may, in the furtherance of their training, be assigned from time to time to various types of work in the establishment. At such times, the employee in training status may be performing equal work with nontrainees of the opposite sex whose wages or wage rates may be unequal to those of the trainee. Under these circumstances, provided the rate paid to the employee in training status is paid regardless of sex, under the training program, the differential can be shown to be attributable to a factor other than sex and no violation of the equal pay standard will result. 28 C.F.R. § 800.148 (1976).

[52/] I.e., in such instances, WHD will make certain that there really is a training program and that the employer is not merely covering up an equal pay violation by inventing a mythical "training program". In Usery v. Johnson (DCNC, 14 EPD para. 7644) the court held that where employees named by the employer as "participating" in the program were unaware of the existance of any training program, higher pay for male "participants" was not justified.

In part, these omissions from the regulations may be attributable to a limitation in the Equal Pay Act, which does not prohibit employers from making differential assignments based on sex, but only from paying different wages to men and women for the same work once assignments have been made. The deficiency in DOL regulations, however, is that they do not reflect that training opportunities are frequently part of the benefits, and consequently, the wages which employees receive.[53] Thus, to the extent that one sex is excluded from training opportunites, this may well be a violation of the Equal Pay Act which should be explained in DOL regulations.

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[53] Indeed, employers in their job announcements often list training as one of the fringe benefits which will accrue to persons who are accepted for employment. See The Wall Street Journal, Aug. 4, 1977, p. 15 and The Washington Post, Aug. 7, 1977, p. H3.

IV. Enforcement

A. Administrative Enforcement

During fiscal years 1975 and 1976, DOL regional and area office staff appear to have decreased from earlier years their emphasis on Equal Pay Act enforcement. By most measures, DOL activity to enforce the Equal Pay Act appears to have diminished between fiscal years 1974 and 1976. As shown in Table I, the number of Equal Pay Act complaints received by the Department of Labor decreased from 2,864 in fiscal year 1974 to 2,727 in fiscal year 1975 and to 2,311 in fiscal year 1976.[54/] The number of compliance actions in fiscal year 1976 was more than one-third smaller than the number in fiscal year 1974, and the number of employees found to have been underpaid was one-fourth smaller than the number in fiscal year 1976. As shown in Exhibit 3-1, the amount of back wages found due also decreased, while the amount of income restored increased.

Since Equal Pay Act investigations can either be triggered by complaints or initiated by DOL compliance officers in the course of investigating other laws enforced by the Wage and Hour Division, DOL officials believe that such data may be indicative of a decline in productivity on equal pay matters in regional and area offices. The national office has instituted a number of procedures to remedy this problem. In late 1976, all regional offices were reminded of the

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[54/] Information supplied by Employment Standards Administration, Department of Labor, July 1977. During the first ten months of fiscal year 1977 the Department of Labor received 2,402 complaints which exceeds the total number of complaints received during the entire fiscal year 1976. Elisburg comments, supra note 4.

EXHIBIT 3-1

COMPLIANCE ACTIVITY

	Fiscal Year 1974	Fiscal Year 1975	Fiscal Year 1976
Complaints received	2,864	2,727	2,311
Compliance actions	11,070	6,951	6,698
Employees underpaid	32,792	31,843	24,610
Income restored	$6,841,443	$7,474,163	$7,881,502
Back wages found due	$20,523,830	$26,484,860	$17,484,860

Source: U.S. Department of Labor, Employment Standards Administration, July 1977 importance of conducting Equal Pay Act investigations.[55] In early 1977, they were advised of the specific actions they were expected to undertake and were required to report to the national office on their efforts to increase the number of EPA investigations they undertake.[56]

The backlog in Equal Pay Act complaints has increased only slightly. At the end of fiscal year 1974, the Wage and Hour Division reported a backlog of 1,606 complaints nationwide.[57] At the end of fiscal year 1976, the national backlog of complaints had increased to 1,860. However, as of May 20, 1977, the backlog had been reduced again to 1,686.[58] As a result of the backlog, frequently in 1976 investigations were not initiated until three months after a complaint had been filed, a problem which had also been identified by the Commission in 1975.[59] In October 1976, after discovering that a number of EPA complaints remained uninvestigated for more than three months,[60] DOL required each region to submit a monthly status report listing separately r each area office the number of unopened EPA complaints, the number of unopened complaints over 90 days old, and the number of open complaints.[61] This system may have had some impact because as of the end of May 1977, the number of 90-day-old unopened complaints had been reduced.[62]

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[55] Memorandum from John C. Read, Assistant Secretary, ESA, and Ronald J. James, Administrator, WHD, Employment Standards Administration, Department of Labor, to All Regional Administrators, "Equal Pay Act Enforcement," Oct. 20, 1976. The specific steps included meeting goals for an increased number of Equal Pay Act investigations and targeting such areas as banking, retail sales, and college athletics for review. Id.

[56] Memorandum from Warren D. Landis, Acting Wage Hour Administrator, to William L. Smith, Assistant Administrator, Wage Hour, Boston, Mass. (Region I) Department of Labor, "EPA Enforcement," Mar. 28, 1977. Similar memoranda were sent to the other nine DOL regions.

[57] The 1974 backlog is discussed in Volume V, supra note 8, at 441.

[58] Elisburg letter, supra note 4.

[59] Volume V, supra note 8, at 441.

[60] As of October 30, 1976, 371 complaints, which comprised 22 percent of the backlog, had been uninvestigated for 90 days or more.

Effective July 1977, DOL had improved its complaint investigation procedures by requiring compliance officers to prepare a written narrative report describing their findings in cases where they believe that there is no apparent equal pay violation. New reporting instructions to field personnel also require such reports to include complete information relating to the validity of the complainant's allegations, the case disposition, and the notification of investigative findings to the complainant.[63] The new procedures do not call for the preparation of a complete investigative report, as would be required if a violation was disclosed. However, DOL officials believe that this procedure will remedy problems of the past procedures[64] which did not require COs to document their reasons for concluding that no Equal Pay Act violations had occurred.

In 1976, the Wage and Hour Division instituted a new procedure to improve coordination among area offices responsible for conducting investigations. The procedure, incorporated into the Field Operations

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[61] Interview with Francis W. McGowan, Acting Director, Division of Enforcement Policies and Procedures, Wage and Hour Division, and Walter S. Marx, Acting Director, Division of Equal Pay and Employment Standards, Wage and Hour Division, Employment Standards Administration, Department of Labor, July 18, 1977.

[62] As of May 30, 1977, 245 complaints, which comprised 14 percent of the backlog, had been uninvestigated for 90 days or more.

[63] Elisburg letter, *supra* note 4.

[64] Interview with Warren D. Landis, Acting Wage and Hour Administrator ESA, DOL, Jul. 22, 1977 /hereinafter referred to as Landis interview/.

Handbook,[65] affects enforcement action directed at multi-unit enterprises.[66] Prior to investigation of a branch establishment of a multi-unit enterprise, the Wage and Hour investigating office[67] is required to contact the area office located near or responsible for the company's main office in order to learn of possible prior or current DOL investigations. At the conclusion of the investigation, the investigating office must furnish a report of its findings to the DOL office with responsibility for the company's headquarters. Under this system, the DOL office with responsibility for the corporate headquarters analyzes the reports it receives and makes recommendations to the appropriate regional office and/or the Wage and Hour Division national office regarding the possible initiation of national compliance actions. DOL officials believe that these procedures will foster uniform enforcement of the EPA and serve to maximize EPA compliance.[68]

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[65] Field Operations Handbook, at 61A-F (Aug. 16, 1976).

[66] Multi-unit enterprises are those with one central headquarters and a variety of offices or locations in more than one state and/or DOL region. Id.

[67] Although area offices generally conduct Equal Pay Act investigations, investigations may be conducted by Wage and Hour Division regional or national offices.

[68] Landis interview, supra note 64.

Several other deficiencies in the Department of Labor procedures for conducting Equal Pay Act investigations noted by this Commission in 1975, had not been corrected by July 1977. These deficiencies included:

- Failure to notify all affected employees in an establishment of the fact that a DOL investigation is being conducted.
- Failure to provide complainants with a copy of the investigative report of a completed investigation.
- Failure to provide affected employees or employers with a notice or explanation of the process for appealing DOL decisions.

DOL responded to each of these deficiencies.

1. DOL stated:

> With respect to the first alleged deficiency, the Compliance Officer routinely conducts a tour of the establishment during the course of his/her investigation. As a result of the tour most affected employees are made aware that a DOL representative is conducting an investigation. It would be impractical and unfeasible to provide wholesale notification of an ongoing investigation. 69/

Commission staff have not observed an EPA investigation and therefore cannot comment on the effectiveness of this procedure,

2. DOL stated:

> It is long established Wage-Hour policy to notify all complainants of the results of an investigation in all cases. This may be orally or in writing. To provide complainants with "a copy of the investigative report," which may contain information totally unrelated to the particular complainant, would be very poor policy. 70/

This position appears to be a retreat from DOL's position in 1975 when DOL reported that it was studying its policy in this area and hoped to make some parts of investigative reports available to complainants when requested to do so. On the basis of the results DOL provides, the employee must

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69/ Elisburg comments, supra note 6.

70/ Id.

decide whether to accept or reject the back wages and the terms of the settlement offered. The employee, however, may not know the facts in the investigation which led to the results and therefore may have inadequate information upon which to form a judgment.

3. DOL stated:

> With regard to notifying affected employees and employers of the process of appealing DOL decisions it is policy that Compliance Officers advise complainants and employers that they may contact the respective Area Director in those instances where they take exception to the Compliance Officer's determination. 71/

This Commission welcomes this apparent change in DOL policy. It should be noted, however, that this policy is not written in the FOH or IB and that it does not reflect the existence of a formal appeals procedure. There are no written rules, regulations, or guidelines which state what the appeals process entails, providing, for example, time frames for appeals or stating whether there is a right of appeal beyond the area offices to regional offices or Washington.

WHD reviews of area office complaint investigations appear to be insufficient in some cases. In the course of reviewing 10 EPA investigative reports which were also being evaluated by HUD, 72/ Commission staff observed that in at least two cases the reports contained strong evidence of violations of Title VII of the Civil Rights Act of 1964 which were not covered by EPA. EPA regulations encourage violations of laws not enforced by DOL to be reported to the appropriate agency, which in this case

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71/ Id.

72/ WHD was analyzing the investigations as part of a review of the work of all regions. As of August 1977, DOL had reviewed a significant sample of all area office investigations and had begun focussing on those offices which exhibited problems. Interview with Richard D. McMullen, Chief, Branch of Equal Pay, Wage and Hour Division, Employment Standards Administration, DOL, Aug. 4, 1977.

would have been the Equal Employment Opportunity Commission. In these instances, however, the possible Title VII violations had not been identified by the investigator, no referrals to EEOC had been made, and the WHD evaluation did not mention this failure.

As of July 1977, DOL did not have an adequate system of collecting the information necessary to monitor the success of its compliance activities and to effectively allocate resources to regional and area offices. Although the Wage and Hour Division plans to invite bids on a redesign of its data collection system,[73] its official position is that existing reporting systems provide the capability of monitoring enforcement activity "down to the area office level."[74] Nonetheless, some DOL officials have expressed concern that the current information systems are inadequate.[75] In addition, under present DOL procedures, it is impossible to assess whether COs are, as required, identifying any equal pay violations while conducting an FLSA investigation.[76] Moreover, DOL does not adequately follow up its enforcement activity to ensure that EPA violations do not recur.[77]

73/ Marx and McGowan interview, supra note 61.

74/ Elisburg letter, supra note 4.

75/ Marx and McGowan interview, supra note 61.

76/ This problem was noted by this Commission in 1975. See Volume V, supra note 8, at 451.

77/ DOL does not deny this allegation, but has indicated that when it receives complaints, it does review employees who have previously been investigated. DOL stated:

> Although it is true that DOL does not routinely conduct reinvestigations in all instances, DOL does schedule and conduct reinvestigations, e.g., when information is received that an employer who was previously investigated is not currently in compliance with the Equal Pay Act. Elisburg comments, supra note 4.

B. Court Enforcement

A substantial proportion of EPA complaints are referred to the regional solicitors offices for possible court enforcement, and these offices have been successful at obtaining substantial amounts of back pay for employees. In fiscal year 1975, Wage and Hour area offices referred 606 cases to regional solicitor's offices for possible court enforcement. Suit was filed in 152 cases and litigation was concluded in 166 cases during that year. A total of 84 cases were settled. In addition, as a result of both court orders and out of court settlements, the Office of the Solicitor recovered $7.686.607 on behalf of 10,832 employees in fiscal year 1975, in addition to amounts which were recovered by Wage and Hour Offices.

In fiscal year 1976, 428 cases were referred to the regional solicitor's offices. Legal action was filed in 164 cases and litigation was concluded in 135. Settlement was reached in 47 cases. In all, the Solicitor's Office alone recovered $4,919,607 on behalf of 8,492 employees, as a result of lawsuits and settlements. 78/

78/ Elisburg letter, supra note 4.

Although the Department of Labor has had jurisdiction to enforce the Equal Pay Act in educational institutions since 1974, the first EPA lawsuit against a university to go to trial was just being heard in court in July 1977.[79] As of July 1977, the Solicitor had filed 15 equal pay lawsuits involving professionals against colleges and universities, 1 in 1974, 10 in 1975, 3 in 1976, and 1 in 1977.[80]

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[79] This suit was against Memphis State University, filed in 1975. DOL expected the trial to consume several weeks while close to 100 witnesses would be called to testify. Elisburg letter, supra note 4.

[80] The institutions were: 1974, Boston State College; 1975, Saint Mary's College (North Carolina), Austin Peay State University, Tennessee Technological University, University of Texas, Memphis State University, University of Nevada (Reno), Chicago State University, Pacific Union Conference of Seventh Day Adventists, Kent State University, and Eastern Kentucky University; 1976, University of Minnesota, Framingham State College, and Napa Community College; 1977, Boise State Junior College.

V. Coordination

DOL has accomplished far too little interagency coordination under the Equal Pay Act. In 1975, the Commission found a number of serious problems with respect to DOL's interagency coordination of EPA enforcement and standards.[81] In particular, the Commission found that DOL had failed to:

- Provide adequate guidance to the public with respect to the differences between the EPA and other civil rights laws such as Title VII of the Civil Rights Act of 1964.
- Encourage coordination at the staff level between COs and EEOC investigators or civil rights compliance staffs of other agencies.
- Communicate the existence of Title VII violations identified in the course of DOL investigations to EEOC.
- Coordinate with the U.S. Civil Service Commission, Bureau of Intergovernmental Personnel Programs,[82] equal pay standards for State and local government personnel.
- Implement fully an agreement between DOL and HEW concerning the exchange of information on violations of the EPA and Title IX of the Education Amendment of 1972.[83]

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[81] These problems are discussed more fully in Volume V, supra note 8, at 459-68.

[82] The Bureau of Intergovernmental Personnel Programs (BIPP) is concerned with State and local government personnel systems. BIPP is charged with administering merit systems standards set forth in the Intergovernmental Personnel Act (42 U.S.C. § 4701 (1970)) and monitoring compliance of State and local governments with these standards.

[83] Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (Supp. V, 1975).

- Coordinate with the Department of the Treasury, Office of Revenue Sharing, concerning the possible application of the EPA to the sex discrimination prohibitions of the revenue sharing program which the Department of the Treasury administers. [84]

In 1977, DOL's coordination efforts under the Equal Pay Act were not significantly improved. DOL had participated on the Equal Employment Opportunity Coordinating Council, but the Council had reached only one policy agreement, concerning affirmative action in State and local government. Moreover, since that agreement does not directly affect wage rates, it has little direct relevance to Equal Pay Act enforcement. As of July 1977, DOL had not improved its guidance to the public concerning the differences between its own policies under the Equal Pay Act and those of the Equal Employment Opportunity Commission. It was not actively implementing its policy of encouraging staff to refer Title VII violations to the EEOC.

Interagency coordination appears to have been a low priority under the Equal Pay Act. In response to this Commission's recommendation that DOL improve its coordination of EPA matters with other Federal agencies, DOL merely wrote that it was working with the General Services Administration (GSA) and the Small Business Administration (SBA) "drafting coordination agreements" and that it had "established a dialogue" with HEW "in order to reimplement the cooperative agreement between our respective agencies." [85]

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[84] The Department of the Treasury's Office of Revenue Sharing administers a program which redistributes Federal funds to approximately 39,000 State and local governments under the State and Local Fiscal Assistance Act of 1972. 31 U.S.C. §§ 1221-1263 (Supp. V, 1975) and 26 U.S.C. §§ 6017A and 6687 (Supp. V, 1975).

[85] Elisburg letter, *supra* note 4.

Chapter 4

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC)

Introduction

This chapter evaluates the activities of the Equal Employment Opportunity Commission from July 1975, when this Commission published its report, The Federal Civil Rights Enforcement--1974, Vol. V, To Eliminate Employment Discrimination, through August 1977. The 1975 report identified a number of problems at EEOC and, as this current assessment indicates, prior to June of this year there was inadequate attention paid to correcting them. These problems included ineffective internal management; deficiencies in organizational structure; inability to deal effectively with the large number of individual complaints, resulting in an ever increasing backlog of unresolved charges; and failure to mount an effective litigation program. Although as of October 1977 these problems had not been entirely eradicated, there have been vigorous efforts to correct them since Eleanor Holmes Norton was appointed Chair of EEOC in June 1977. Shortly thereafter, EEOC developed and began to implement what Ms. Norton characterized as the "total redesign of the Commission and its functions." In her words, this effort "represents the most extensive overhaul of the agency structure and processes since the establishment of the Commission in 1965."

The following specific changes, which are discussed in detail in this chapter, are in varying stages of implementation at EEOC as of October 1977:

- The complete reorganization of the EEOC Washington office in order to clarify and strengthen the operational authority of the Executive Director, and the policymaking roles of the Chair and other Commissioners.
- The consolidation of regional offices, district offices, and litigation centers in field offices which will handle all compliance activities from charge receipt through litigation.
- The institution of systematic and detailed new procedures designed to increase agency efficiency in handling both individual charges and pattern and practice discrimination.

EEOC's new leadership has also participated in efforts with the Department of Justice, the Department of Labor, and the Civil Service Commission to resolve longstanding differences among these agencies on the issue of uniform Federal policy on guidelines for employee selection procedures.

It is too early to judge whether EEOC's recent initiatives will prove effective in resolving the massive problems which have plagued the agency. However, drastic measures are clearly needed if EEOC is ever to become an agency which effectively combats employment discrimination, and the program which EEOC's new leadership is implementing has potential for revitalizing the agency.

I. Responsibilities

Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972,[1] remains unaltered since 1975. Thus, the Equal Employment Opportunity Commission's statutory responsibilities have not changed since Volume V was published. EEOC's primary responsibility is to end employment discrimination through the enforcement of the act. In order to do so, the agency is empowered to investigate charges of discrimination, to attempt to resolve them through conciliation, and as a result of the 1972 amendments to the act to file and prosecute lawsuits against those respondents subject to its litigation jurisdiction where conciliation efforts fail.

EEOC plans to improve its use of EEO reports and other statistical data gathered pursuant to section 709 of Title VII. In 1975, this Commission noted that EEOC was making inadequate use of the data which it collected, particularly as a foundation for Commissioner charges alleging patterns or practices of discrimination. By June 1977, the situation appeared not to have changed. In mid-1976 the General Accounting Office (GAO) observed that EEOC's data collection was incomplete (with only about 80 percent of those required to file actually doing so), unverified (EEOC has no systematic means for determining if the information reported is correct), and not distributed for use on a timely basis.[2] In late 1976, in a staff report issued by the House Subcommittee on Equal Opportunities, EEOC's failure to make use of the data it did collect was again noted.[3]

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[1] 42 U.S.C § 2000e (Supp. V, 1975).

In particular, EEOC has three computerized systems, first developed in June 1973, which are not being adequately used, although they could be incorporated in a system to target employers for investigation of pattern and practice discrimination. These are:

1. The Employment Analysis Report Program (EARP)

   The EARP is a computer model which displays employment data and participation rates for all race/ethnic groups by sex and all job categories for any establishment in the EEOC data files.

2. Multi-Year Analysis Report Program

   This computerized system builds upon the EARP system and is capable of displaying the minority employment trend of a given employer for any two selected years in order to determine the employer's progress in meeting Title VII standards.

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[2] General Accounting Office, Report to Congress - The Equal Employment Opportunity Commission Has Made Little Progress in Eliminating Employment Discrimination 49 (September 1976)[hereinafter referred to as GAO Report - Sept. 1976].

[3] Staff Report of Subcommittee on Equal Opportunities of House Committee on Education and Labor, 94th Cong., 2d Sess., Report on Oversight Investigation of Federal Enforcement of Equal Employment Opportunity Laws 17 and 46 (December 1976) (hereinafter referred to as Congressional oversight report).

3. The Trend Analysis Report Program

> This computer system shows the minority participation rate and the minority promotional trend for any employer for three selected years. [4]

In July 1977, EEOC adopted a formal resolution to improve and increase the effectiveness of the agency. One element of EEOC's plans was to employ its data collection systems to target employers and unions, as part of a full scale program for investigating and eliminating systemic discrimination. [5]

Volume V also observed that Title VII's § 709(e) confidentiality requirements hampered effective use of EEOC data by private litigants and other government agencies, and this has not changed.[6]

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[4] Memorandum from Peter Robertson, Director, Office of Federal Liaison, EEOC, to Steven Sacks, U.S. Commission on Civil Rights, Supplemental Information for Civil Rights Commission, July 25, 1977 [hereinafter referred to as July 25 Robertson memorandum].

[5] This resolution is discussed more fully in the section on Compliance in Part 2, *infra*.

[6] EEOC has, however, pointed out that it makes maximum use of its authority to disseminate statistical data within the confines of legality. In this regard, EEOC has provided documentation that State and local, as well as other Federal agencies and private parties, are regularly supplied with aggregate statistics which do not identify individual reporting units. July 25 Robertson memorandum, *supra* note 4.

II. Organization, Management, and Staffing

The same basic organizational and managerial problems of EEOC observed in Volume V continued to dominate the agency from July 1975 until June 1977. At that time the Commission, under the direction of a new Chair, Eleanor Holmes Norton, took a series of actions to address these problems.[7] These problems included:

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[7] In its response to a draft version of this chapter, EEOC commented:

> EEOC recognizes the difficult task which the Civil Rights Commission has in assessing programs which have been instituted within the last three months against a past where Commission processes were similar to those discussed and criticized in the 1975 report. Further, EEOC appreciates the comments on some of its procedures which have been adopted and implemented since June 6, 1977 when Commissioner Eleanor Holmes Norton assumed the Chair. However, the EEOC is concerned that the draft report does not adequately recognize the extent to which the past deficiencies of the Commission have been and are being corrected, the extent to which the EEOC has accepted and acted upon the earlier recommendations of the Civil Rights Commission, or the extent to which the Commission has addressed some of the problems which are correctly identified in the draft report. Memorandum from Alfred Blumrosen, Special Assistant to the Chair, EEOC, to Steven Sacks, Commission on Civil Rights, "EEOC Comments on Civil Rights Commission Report on EEOC," Sept. 6, 1977, at 2 /hereinafter referred to as September 6 EEOC comments/.

EEOC's comments went on to itemize the specific instances in which it believed the Commission on Civil Rights had failed to take its new program fully into account. This chapter has since been modified to remedy inaccuracies, add additional information, and reflect those differences of opinion which remain outstanding.

1. The uncertain division of authority between the Chair and the Executive Director;
2. The ill-defined roles and responsibilities of the other Commissioners;
3. The independent and potentially isolated status of the General Counsel and the agency's legal staff;
4. The ineffective utilization of field office resources; and
5. The absence of an internal auditing system to measure the performance of agency personnel.

Major structural and organizational changes in EEOC were approved by unanimous Commission vote on July 20, 1977. These changes are integrally related to the comprehensive overhaul of EEOC's compliance process, and are therefore discussed in the evaluation of those plans at the end of Section IV, Compliance.

During the period from July 1975 to June 1977, EEOC continued to suffer from an extremely unwieldy organizational structure, and a rapid turnover in the positions of Chair, Commissioners, Executive Director, and General Counsel. In 1976, both GAO and the House Subcommittee on Equal Opportunities observed the adverse impact these frequent changes have had on Commission policy, administrative procedures, and organization, particularly on the implementation of policy at the field level. The result has been uncertainty and a reluctance of field staff to implement current policy fully.[8]

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[8] GAO Report - Sept. 1976, supra note 2, at 60-61, and Congressional oversight report, supra note 3, at 41-42.

A. The Chair and the Executive Director

In October 1975, EEOC strengthened its headquarters' organizational structure by placing greater administrative responsibility in the Office of the Executive Director. This reorganization was perhaps most significant in that it transferred supervision of the Office of Program, Planning and Evaluation (OPP&E) to the Executive Director. OPP&E previously reported directly to the Chair. The responsibilities of OPP&E are to review all headquarters and field compliance activities, and to recommend new programs, changes in agency policy and procedure, and allocation of resources within EEOC. 9/ The fact that such recommendations could be placed before the Commission without any input from the Executive Director indicates the degree to which that position lacked meaningful authority within EEOC before the October 1975 reorganization.

9/ A good example of OPP&E's importance was the fact that it developed the Resource Allocation Strategy, which EEOC implemented in August 1973. This strategy was the EEOC plan for long term use of agency resources to deal simultaneously with individual charge processing and systemic discrimination.

Although this reorganization went a long way toward clarifying the roles of the Chair and the Executive Director, its full potential impact was blunted by the departure of the incumbents within 6 months of its implementation. [10] The lack of firm and constant leadership in these two positions left the agency's middle managers uncertain of how to communicate with one another and with the Commission. One example of this involves the Office of Field Operations (OFO). Prior to the reorganization, OFO served the limited functions of providing the field with technical assistance and gathering and collating field office statistical reports. The reorganization was intended to enhance the authority and responsibility of OFO by making it the direct link between the Executive Director and all field offices for communication on all substantive and administrative policy matters. However, OFO's new mission never fully materialized. The office's new statement of mission and function, required by the reorganization notice, was never released [11] and OFO has been largely ignored by the field in communication with headquarters ever since. [12]

Since becoming Chair on June 6, 1977, Eleanor H. Norton has taken a number of steps to further solidify the Executive Director's authority and at the same time clarify the Chair's role. The Chair has announced to the agency that the Executive Director has full authority over all staff components of the agency in headquarters and the field. The Chair communicates to staff only through the Executive Director, and program directors may no longer present matters to a Commissioner or the Chair directly. This frees the Chair to concentrate on policymaking and strengthens the authority of the Executive Director.[13]

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[10] Interview with Ethel Bent Walsh, Vice Chairman, EEOC, July 20, 1977.

[11] Id.

[12] Interview with Preston David, Executive Director, EEOC, July 25, 1977.

The size of the Chair's personal support staff has also been reduced and specific program area responsibilities for such staff eliminated.[14] According to EEOC, the separation of administrative and operational authority from policymaking enabled Chair Norton to personally re-open the policy questions involving uniform Federal employee selection guidelines with top officials from DOJ and DOL.[15]

B. The Commissioners

With the exception of the Chair, EEOC's Commissioners have essentially remained pro forma functionaries in the two years since Volume V was released.[16] The Commissioners have continued to set formally EEOC policy. By majority vote at Commission meetings, decisions regarding allocation of resources (including all external grants and contracts), approval of determinations in nonprecedent cases, and approval for litigation of cases recommended to it by the General Counsel's Office continued to constitute the bulk of the Commissioners' responsibilities. Commissioners also acted as initiating agents for

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13/ Memorandum from Alfred W. Blumrosen, Special Assistant to the Chair, EEOC, to Steven Sacks, Office of Federal Civil Rights Evaluation, U.S. Commission on Civil Rights, July 25, 1977, at 3 [hereinafter referred to as July 25 Blumrosen memorandum].

14/ Memorandum from Peter Robertson, Director, Office of Federal Liaison to Alfred W. Blumrosen, Special Assistant to the Chair, EEOC, Report of Civil Rights Commission, July 22, 1977, at item 9 /hereinafter referred to as July 22 Robertson memorandum/.

15/ These efforts have resulted in draft guidelines which have been discussed with other Federal agencies but have not yet been circulated for public comment.

16/ This observation is corroborated in Congressional oversight report, supra note 3.

Commissioner charges, utilized by EEOC pursuant to both sections 706 and 707 of Title VII to institute systemic investigations. Commissioners are also empowered to conduct public hearings, but have not done so in the past two years.[17]

Most Commissioner activity prior to June 1977 was in the final analysis, merely a rubber-stamping of staff recommendations. Although Commissioners have had the negative power of veto over actions by the agency, they continued to lack a positive developmental role within EEOC. This is a matter which has been of deep concern to EEOC's Commissioners.[18]

From mid-1976 through mid-September 1977 there have consistently been two vacancies on the five member Commission.[19] These vacancies are further evidence of the lack of importance which has been attached to the position of Commissioner.

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[17] Interview with Daniel Leach, Commissioner, EEOC, July 21, 1977. This is a particularly unfortunate omission in Commissioner Leach's view, since Commissioner-conducted hearings offer the agency an opportunity not only to obtain useful information and opinion from around the country, but at the same time could serve to increase the EEOC's visibility in a positive way.

[18] Walsh and Leach interviews, supra notes 10 and 17.

[19] Telephone interview with Gwen Johnson, EEOC Office of Personnel, Aug. 6, 1977. As of August 1977 the Commissioners were Eleanor Holmes Norton (Chair), Daniel Leach (Vice-Chair), and Ethel Bent Walsh.

The current EEOC administration is cognizant of the strain created by the imbalance in responsibilities between the Chair and the other Commissioners and has instituted measures to ameliorate this situation. Ms. Norton has stated her intent to act in the future according to a "collegial decisionmaking system" with the other Commissioners. Moreover, she has indicated that, hereinafter, Commissioners will be briefed in advance on subjects which are likely to come before the Commission for a vote, so that the Commissioners "are involved and contributing well before an issue appears on the Commission agenda."[20] Commissioner participation in the development of the July 20th reorganization resolution and a memorandum representing EEOC's position on seniority[21] are examples of increasing Commissioner involvement in EEOC's policymaking[22] since June 1977.

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[20] Hearings before the Subcommittee on Equal Opportunities of the House Committee on Education and Labor, 95th Cong., 1st Sess., Statement of Eleanor Holmes Norton, Chair, EEOC, July 27, 1977, at 31 [hereinafter referred to as Norton testimony].

[21] Interpretive Memorandum: International Brotherhood of Teamsters et al v. United States; United Airlines, Inc. v. Carolyn J. Evans. EEOC notice N-915, July 14, 1977.

[22] September 6 EEOC comments, *supra* note 7, at 2.

EEOC has also indicated that it has adopted plans for the creation of a new unit in EEOC. As described by EEOC, the function of this unit will be "aiding the Commission in setting policies, issuing guidelines, regulations, other general rulings, holding hearings and otherwise seeking to implement Title VII through the affirmative use of the administrative process."[23/] There is clear evidence that EEOC intends to include the Commissioners or members of their personal staff in the deliberations of this new unit. [24/]

C. Office of General Counsel

The Office of General Counsel has improved its ability to communicate policy to the field.[25/] In January 1976, EEOC issued a detailed General Counsel Manual, designed to provide standardized procedures for attorneys in EEOC.[26/]

Since July 1975, the Office of General Counsel (OGC) has improved its staffing. Volume V reported that as late as February 1975, OGC had

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[23/] July 25 Blumrosen memorandum, supra note 13, at 2.

[24/] In September 1977, EEOC noted that the means for direct Commissioner participation in staff work of the agency was already in place. In addition to their active involvement in developing the July 20th Commission resolution and the seniority memorandum, EEOC pointed out that, "of special significance, the staff of individual commissioners work alongside the staff of the chair in handling major assignments in the development of both policy and program initiatives." Written response of Eleanor Norton, Chair, EEOC, Aug. 15, 1977, to written questions submitted by Congressman Augustus Hawkins, Chairman, House Subcommittee on Equal Opportunities, Aug. 2, 1977.

[25/] Communication with the field was identified as a problem in The Federal Civil Rights Enforcement Effort -- 1974, Vol. V, To Eliminate Employment Discrimination 500 (July 1975) /hereinafter referred to as Volume V/.

[26/] EEOC Order No. 635 - General Counsel Manual, Jan. 12, 1976.

a vacancy rate of more than 14 percent, nearly twice that of the agency as a whole.[27] A number of specific administrative actions were taken in late 1975, however, and by February 1977 the vacancy rate was reduced to 8 percent. At that time a hiring freeze was imposed on the Agency and the vacancy rate had risen through attrition to 10.5 percent by June 30, 1977.[28]

D. Field Offices

The District Office structure in effect at the time Volume V was written has been considerably altered on paper, although many of the planned changes have not been fully implemented.

- In late 1975 the positions of investigators and conciliators were merged into the single job classification EOS generalist.
- In March 1977, by EEOC Order No. 124, the record keeping and preinvestigative analysis functions, located in the Pre-Investigative Analysis Units, were placed in two separate units: The Record Management Unit and Compliance Unit I.[29]
- The Technical Analysis Writer (TAW) Units, whose function was determination writing, were formally abolished.
- Order No. 124 created three additional compliance units in each District Office with identical functions -- Compliance Units II, III, and IV -- responsible for investigation, conciliation, and determination writing.

27/ Volume V, supra note 25, at 500.

28/ July 22 Robertson memorandum, supra note 14, at item 22.

29/ This unit is supposed to receive, analyze, and defer all incoming charges; classify charges by processing strategy; do pre-investigation analysis; review the final findings and orders of 706 Agencies (the deferral coordinators are now located in this unit); investigate those charges where a relatively simple interrogatory to respondent or charging party is appropriate; handle all of those charges against respondents where EEOC has a special understanding as a result of a conciliation agreement or consent decree; and conduct training and coordination with the 706 Agency. Hence, this Compliance Unit is usually the largest unit in the District Office. July 22 Robertson memorandum, supra note 14, at item 20.

The Order No. 124 reorganization also did away with the concept of a "standard-sized" compliance unit, thus allowing each District Office, depending on its workload, to adjust as necessary the number of professional and clerical employees working under a given supervisor.[30]

One of the primary purposes of the creation of Compliance Unit No. 1 was to improve inadequate preinvestigative analysis[31] by requiring preinvestigative technicians to report to senior-level supervisors. EEOC, however, has not taken action to alter the basic problem of assigning relatively low grade-level (GS 5-8) technicians to handle the bulk of the preinvestigative process.

Morever, as of mid-August 1977, Order No. 124 had not been placed in operation on an agency-wide basis. It appears that further implementation of this order is being held up pending the reorganization announced by the new Chair,[32] and that the order itself may be rescinded.[33]

E. Management Information Systems

EEOC continues to have no effective system for measuring performance by individual agency personnel. In December 1976, the House Subcommittee on Equal Opportunities observed that no production or performance standards exist for Regional and District office employees, resulting in a wide variation in the caseload and production of individual investigators and other field personnel.[34] The Subcommittee stressed the need for the establishment of national criteria for performance to improve the quality of field operations.[35]

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[30] July 22 Robertson memorandum, supra note 14, at item 20.

[31] Id. at item 28A.

[32] See discussion infra concerning this reorganization.

[33] Telephone interview with Everett Ware, Director, Boston District Office, EEOC, Aug. 11, 1977.

EEOC's new leadership is aware of the deficiencies which its current information systems create in terms of self-audit. As of July 1977 information systems were being developed which will, in the words of EEOC's new Chairperson "[hold] managers of all functions at the Commission accountable for their performance."[36] Ms. Norton further stated that:

> The Management System will have four major parts: a) a prioritized and detailed statement of the agency's missions and program objectives within each mission; b) a performance and resource plan with objectives and goals jointly developed by line managers and the Executive Director; c) a systematic way to identify and correct specific operational deficiencies with deadlines for accomplishment; and d) a system for anticipating critical issues which must be faced during each quarter, thus avoiding management by crisis. Agency managers will be held accountable for meeting the objectives of the management plan and will be evaluated accordingly.[37]

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[34] Congressional oversight report, *supra* note 3, at 45.

[35] *Id*. at 17.

[36] Norton testimony, *supra* note 20, at 23-24.

[37] *Id*.

III. Compliance

In order to present an accurate picture of EEOC's compliance posture this section is divided into two segments. Part 1 updates Volume V through July 1977. Part 2 is a description and assessment of recently adopted EEOC plans for a totally revamped charge processing system and the organizational restructuring to be implemented in support of that system.

Part 1.

A. Intake and Investigation

1. Intake:

The annual rate of charge filing at EEOC has risen sharply since Volume V was released. In fiscal year 1976, 75,173 charges of employment discrimination were filed as compared with 56,953 in fiscal year 1974. Moreover, EEOC estimates that the number of individual charges filed will increase to 87,000 in fiscal year 1977. In addition to the large increase in filings, the fiscal year 1976 data also evidenced some substantial shifts in the types of respondents against whom charges were being filed. There was a considerable drop in the number of complaints filed against State and local governments (8,493 in 1976 as compared with 15,968 in 1974) and educational institutions (1,978 in 1976 as compared with 2,500 in 1974). On the other hand, charges against unions and joint apprenticeship committees rose, from 1,972 in fiscal year 1973 to 5,205 in fiscal year 1976.[38]

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[38] Attachment to July 22 Robertson memorandum, supra note 14.

In fiscal year 1973, 48,899 charges were filed. In many of these charges, parties alleged discrimination on more than one basis, for example, on the bases of race and sex. Thus, these 48,899 charges produced 107,846 allegations of discrimination on separate bases.[39/] By fiscal year 1976, 75,173 charges produced only 84,921 separate bases for alleged discrimination. The figures for 1976 indicate that allegations of race discrimination constitute 52 percent of the total, sex 31 percent, national origin about 10.5 percent, and religion approximately 2.5 percent, similar to the distribution found in 1973.[40/]

EEOC's intake procedures remained inadequate as of July 1977. In December 1976, GAO reported that poor screening at the intake phase had resulted in the erroneous acceptance and processing of incomplete and frivolous charges. GAO recommended that EEOC develop more effective screening to ensure that charging party abuses of the system do not result in inflated workload and productivity figures.[41/] On this same point, the Staff Report of the House Subcommittee on Equal Opportunities stated that "the charge intake procedure contributes to the high rate of failure and delay in charge resolution"[42/] due to the substantial number of unmeritorious charges filed each year. The high rate of closures due to lack of jurisdiction after charges were originally accepted is indicative of the inefficiency of EEOC's intake procedures. During fiscal year 1976 approximately 17.5 percent of EEOC's administrative closures were due to lack of jurisdiction.[43/]

[39/] Volume V, supra note 25, at 510.

[40/] In 1973, just under 50 percent of all allegations were based on race, 31 percent on sex, 11 percent on national origin, and 2 percent on religion. Id. at 512.

[41/] GAO Report - Sept. 1976, supra note 2, at 64.

[42/] Congressional oversight report, supra note 3, at 26-27.

[43/] Id. at 27.

In response to these points EEOC has indicated that a cross-check is now required on new charge related material to assure that it is not an addition, amplification, or clarification of a charge already on file. If it is found to be duplicative, the original complaint is amended. No new charge file is created and respondents are not sent repetitious notices.[44] While this system should alleviate duplication of existing charges, there is no evidence that it addresses the problems of nonjurisdictional and frivolous charges which are swelling EEOC's workload.

2. Investigation:

During the past two years EEOC has expanded its policy of narrow scope investigation. On June 26, 1975, EEOC issued revised Section 19, EEOC Compliance Manual, entitled "Limited Scope Charges," which instructs EEOC investigators to limit investigations to those allegations which affect the charging party. This revision considerably expanded the number of charges which would be given limited scope treatment, thereby decreasing the frequency with which "like and related" issues are required to be investigated.[45] Prior to June 26, limited scope was available as a strategy for investigations only when the charge under investigation was the sole charge existing against the respondent.[46]

The Staff Report of the House Subcommittee on Equal Opportunities questioned this narrow scope procedure because it was concerned about the potential loss of systemic remedies.[47] However, this concern

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44/ July 22 Robertson memorandum, supra note 14, at item 28A.

45/ EEOC Directive Transmittal 154, June 26, 1975.

46/ July 22 Robertson memorandum, supra note 14, at item 30.

47/ Congressional oversight report, supra note 3, at 32.

may be unnecessary, since higher level EEOC staff retain the options of selectively broadening individual charges into pattern and practice investigations and seeking Commissioner charges to pursue systemic discrimination.

EEOC has formalized a procedure for the preparation and use of interrogatories[48] in the investigative process. In late 1976, EEOC improved its use of interrogatories with the adoption of the "Document Assembly System," which enables EEOC to apply computer technology to the preparation of interrogatories by field office personnel.[49]

B. Determination

Reasonable cause determinations by EEOC District Offices continue to be inadequate for litigative purposes.[50] *Volume V* reported that only 124 of 1319 cases recommended by District Offices for lawsuit were accepted by the agency's legal staff, a rejection rate in excess of 90 percent.[51] As of fiscal year 1976, EEOC had been able to bring this rejection rate down no further than to 86 percent.[52]

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[48] *Volume V* stated that: "Interrogatories are questions proposed by EEOC to the respondent. EEOC has no requirements as to the use of interrogatories." *Volume V*, *supra* note 25, at 515.

[49] EEOC Notices 901, Dec. 16, 1976 and 901A, Mar. 30, 1977.

[50] Part 2 *infra* discusses in detail the plans for a new standard of reasonable cause which EEOC hopes will remedy this problem.

[51] *Volume* V, *supra* note 25, at 539.

[52] July 22 Robertson memorandum, *supra* note 14, at item 39.

C. Conciliation

1. Pre-Determination Settlements:

EEOC has shown a substantial numerical increase in the number of charges settled prior to a full investigation and finding. In fiscal year 1973 EEOC achieved pre-determination settlements (PDS's) on 1,069 charges.[53/] Figures for fiscal year 1976 show a threefold increase in PDS's to 3,177.[54/] One factor in this improved performance was the April 1975 revision of Section 61 of EEOC's Compliance Manual, permitting PDS activity by investigators as well as conciliators, and allowing attempts at PDS in all cases regardless of whether Commission precedent existed on the issues raised in a case.[55/] These liberalized procedures were consistent with the "limited scope" investigation philosophy adopted within 2 months of the Section 61 changes.

As of July 1977, however, PDS activity remained tied to at least some investigation requirements, since the EEOC Compliance Manual still required that the staff member handling the case have enough relevant facts to determine that the terms of settlement satisfy Title VII standards.[56/] Such a requirement may impede settlements in cases where, absent any investigation, a respondent makes an offer which the complainant is prepared to accept. It would appear that this requirement is not a useful one. There is no

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53/ Volume V, supra note 25, at 523.

54/ Attachment to July 22 Robertson memorandum, supra note 14.

55/ Id. at item 33.

56/ EEOC Compliance Manual, Sec. 61, Subpart 61.3(c).

reason to place any investigative burden in the path of settlement of individual charges. As noted above, EEOC has the ability to selectively target major respondents for detailed systemic investigation.

2. Formal Conciliation:

The percentage of successful settlements obtained by EEOC as a result of conciliation attempts has improved slightly. In March 1973, EEOC's conciliation success rate was approximately 25 percent. EEOC had just obtained litigation authority at that time, and it was widely believed that the percentage of successful conciliation agreements would increase as court enforcement gained momentum and EEOC brought successful court actions in which back pay was awarded.[57/] However, between July 1, 1975, and June 30, 1976, only 2,618 out of a total of 8,279 conciliation attempts resulted in conciliation agreements, a 31 percent rate. In the first eight months of fiscal year 1977, only 31.5 percent of the agency's conciliations were successful.[58/] Thus, it would appear that the statutory authority to litigate, in and of itself, has not made EEOC's conciliation process significantly more effective.

Those conciliations which EEOC does achieve are not uniformly monitored for compliance. According to EEOC, its procedures clearly indicate that discrepancies discovered in monitoring reports, required from employers after successful conciliation, are to be followed up with immediate onsite reviews.[59/]

57/ Letter from John H. Powell, Jr., Chairman, EEOC, to John A. Buggs, Staff Director, U.S. Commission on Civil Rights, Dec. 19, 1974.

58/ Attachment to July 22 Robertson memorandum, supra note 14.

59/ Id. at item 34.

EEOC issued revised procedures for such reviews on August 6, 1974.[60] These procedures provide detailed guidance on factors which should be taken into consideration in determining whether to conduct an on-site visit and state the step-by-step requirements for an on-site post-conciliation investigation. Nonetheless, both GAO and the House Subcommittee on Equal Opportunities have pointed out weaknesses in EEOC's monitoring of conciliation agreements. GAO recommended:

> EEOC should require more intensive and extensive followup reviews to insure that discriminatory features of employment systems are eliminated. EEOC should document the results of these compliance reviews to obtain enough qualitative and quantitative data on changes in the employment status of minorities and women to evaluate EEOC's impact on the broader problem of systemic discrimination.[61]

In its report, the House Subcommittee on Equal Opportunities found that there has been little followup on conciliation agreements due to limited resources and emphasis placed on other compliance activities. District Offices have been under pressure to reduce the charge backlog and therefore give priority to this activity over the monitoring of conciliation agreements. The Subcommittee also noted that EEOC requested no additional staff or resources from Congress for monitoring, so this activity must be assumed by district offices at the expense of other functions.[62]

60/ EEOC Directives Transmittal 118, Aug. 6, 1974.

61/ GAO Report - Sept. 1976, supra note 2, at 66.

62/ Congressional oversight report, supra note 3, at 39-40.

EEOC's new management has indicated that compliance reviews will be much more heavily emphasized in the future. There will be a requirement that a certain percentage of field office resources be devoted to this activity, and systems for measuring field office performance will incorporate a category specifically accounting for this function.[63]

Such additional monitoring is badly needed. In 1976 GAO found that, even after successful conciliation agreements had been reached, analysis of employment statistics before and after conciliation agreements showed little improvement in the employment patterns of minorities and women.[64]

D. Litigation

1. EEOC Litigation:

EEOC has significantly increased its annual rate of filing cases since Volume V was released. EEOC reported, moreover, that it has shortened its case processing time from six months to less than three months. In early 1975, EEOC made special efforts to step up its filing rate by restructuring its headquarters processing unit and auditing the case-handling procedures of each regional litigation center. In addition, a monthly monitoring system was developed for each office and extensive on-site audits of each field office are now conducted by headquarters twice yearly to work directly with staff on significant or troublesome cases. EEOC reports that changes in each center's procedures are directed by headquarters as necessary.[65] According to EEOC, the filing rate has increased since 1975 as a result of these changes.[66] Between July 1, 1975 and June 30, 1976, 345 suits were filed including 82 interventions, 21 suits for interim relief, six section 707 actions, 49 subpoena enforcement actions, 7 cases to enforce breaches of conciliation agreements, and 12 cases to enforce the Commission's reporting requirements. By comparison, EEOC states that 209 suits were filed in fiscal year 1974 and 121 in fiscal year 1973. As of January 1, 1977, the total number of suits filed by EEOC since it was given litigation authority was 895.[67]

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[63] July 25 Blumrosen memorandum, supra note 13, at 8.

[64] GAO Report- Sept. 1976, supra note 2, at 41.

[65] July 22 Robertson memorandum, supra note 14, at items 37 and 45.

[66] Id.

In EEOC's view the distribution of EEOC lawsuits by bases closely reflects the distribution of the bases on which incoming charges are filed. In July 1976, EEOC sampled its docket to assess the proportion of suits according to bases. The sample showed that of the 711 allegations in the sample, 338 (47.5 percent) charged racial discrimination, 263 (37 percent) charged sex discrimination, 13 (1.8 percent) charged discrimination on the basis of religion, and 97 (13.7 percent) charged discrimination on the basis of national origin.[68]

EEOC has reduced duplication in its compliance activities by eliminating presuit settlement procedures. Volume V observed that the presuit settlement procedures negotiated by the Office of the General Counsel were duplicative of the conciliation process and suggested that two processes be integrated.[69] EEOC notes that presuit procedures were discontinued in August 1975, following a detailed study of the efficacy of these procedures. Under current procedures, the General Counsel may authorize presuit settlement in a particular case, but such authorization is unusual.[70]

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[67] Id. at item 37.

[68] Id. at item 38.

[69] Volume V, supra note 25, at 538.

[70] July 22 Robertson memorandum, supra note 14, at item 36

EEOC's systemic efforts have, to date, produced mixed results. The agency has actively helped in establishing important principles of Title VII law. It has, however, been considerably less successful in directly providing relief from patterns and practices of discrimination through systemic litigation.

EEOC's substantive guidelines,[71] as well as many of its decisions and interpretations, have been recognized as being among the most progressive,[72] and have significantly affected the course which the judicial branch has followed in defining the parameters of Title VII. Clearly, to the extent that Federal courts have relied on substantive principles developed by EEOC, the agency can justifiably be credited with having had a major systemic impact.[73] EEOC has also continued its pre-1972 practice of filing as amicus in private suits which raise systemic issues, particularly in cases where the issues raised have been addressed in Commission guidelines or administrative decisions.[74]

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[71] Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604 (1976); Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605 (1976); Guidelines on Discrimination Because of National Origin, 29 C.F.R. § 1606 (1976); and Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 (1976).

[72] Volume V, supra note 25, at 643.

[73] EEOC's current administration is planning to expend considerably more resources on this process of administratively impacting on the development of Title VII. As discussed in Section II, supra, an entirely new unit within EEOC is being created to work solely on such matters. July 25 Blumrosen memorandum, supra note 13, at 1-2.

[74] EEOC has filed as amicus in over 600 such cases. Memorandum from Abner Sibal, General Counsel, EEOC, to Steven Sacks, U.S. Commission on Civil Rights, Impact of the EEOC on the Development of Title VII Law (undated) [hereinafter referred to as Sibal memorandum].

It is also important to note that a substantial portion of EEOC's legal resources continue to be diverted, of necessity, to procedural litigation. Title VII created a complex administrative process, and EEOC has been forced to litigate extensively regarding the law's administrative requirements, in order to protect both its own litigation authority and the rights of complainants. Questions of timeliness as related to the administrative filing of a charge of discrimination, deferral to and reliance on State and local agencies, and the extent to which allegations in administrative charges limit future pleadings in the courts continue to demand much of EEOC's attention.[75]

In addition, the procedural requirements of Title VII have also negatively affected EEOC's ability to carry out an effective systemic litigation program. Litigation under section 706 of Title VII has always had, as a prerequisite, the filing of an administrative charge. This requirement often has resulted in both delay in getting into court and limitations on discovery once litigation has commenced.[76] Although section 707 placed no such burdens in the path of the Department of Justice when that agency had systemic authority, the 1972 amendments to Title VII modified section 707 to require the full administrative process by EEOC before it could litigate pattern and practice cases.[77]

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[75] Id. at 24-40.

[76] See discussion of this point in the Congressional oversight report, supra note 3, at 36.

[77] This point is discussed at some length by Herbert Hill, National Labor Director, NAACP, in his recent article, "The Equal Employment Opportunity Acts of 1964 and 1972: A Critical Analysis of the Legislative History and Administration of the Law," 2 Indus. Rel. L. J. 1, 67-68 (Spring 1977) /hereinafter referred to as Hill article/.

EEOC has made limited progress since 1975 in litigating for systemic relief. Given the fact that there are over 300 attorney positions in its General Counsel's Office alone,[78] the agency's systemic litigation record in terms of the number of lawsuits filed and amount of relief obtained remains inadequate.

EEOC notes, however, that as of July 1977, ninety-one section 707 charges had been initiated, virtually all of which involved respondents with more than 1,000 employees. EEOC also states that its section 706 litigation on individual cases has increasingly focused on systemic issues, stating that one-third, or as many as 300 of these cases, are against respondents with more than 1,000 employees.[79]

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[78] EEOC has a sizeable complement of attorneys outside the General Counsel's Office. Every district and regional office has an attorney, and the Decisions Division of the Office of Compliance has a number of lawyers assigned to it.

[79] July 22 Robertson memorandum, supra note 14, at items 42 and 43.

Specifically, with regard to relief obtained as a result of 706(f)(1) litigation, EEOC points out that in fiscal year 1977 alone it settled thirty-five section 706 suits alleging broad patterns or practices of discrimination. Nineteen of these cases involved monetary settlements of $100,000 or more, and thirteen others contained dollar relief between $25,000 and $99,000. All of the settlement decrees also contained prospective relief, as appropriate, including goals and timetables for hiring, promotion, and transfer, modification of seniority agreements, alterations in layoff and recall provisions, and training.[80/] Back pay in these thirty-two cases amounted to almost $8 million, with an additional $3 million for such other monetary relief as can be immediately calculated (including promotion and incentive bonuses, and money set aside for training programs).[81/] EEOC also has five section 706 case settlements pending district court approval. These five cases involve almost $2 million in relief. EEOC estimates that its fiscal year 1977 section 706 litigation program has produced in excess of $13 million in class relief.

[80/] Memorandum from William L. Robinson, Associate General Counsel, EEOC, to Steven Sacks, U.S. Commission on Civil Rights, EEOC Litigation Program, Sept. 19, 1977.

[81/] EEOC's monetary relief calculation does not include prospective financial improvements in the status of minorities and women, such as increased future earnings, since the agency believes that these benefits, although real, are not subject to completely accurate projections. Id.

Of the 91 section 707 charges which it has filed, EEOC indicates that eight have been settled with systemic relief totaling $3.3 million in back pay and $1.5 million in other specific relief. [82] An additional 45 cases are pending settlement negotiations.

Since EEOC must proceed through the same administrative procedures under section 706 and section 707 it is apparent that any judgments on the success of the agency's systemic litigation program must take into account the nature of the systemic relief obtained under both sections of the statute. These recent figures indicate that while EEOC's systemic effort is still inadequate given the size of its legal staff, it has, particularly in the past year, begun to show rapid improvement.

EEOC can be credited, as well, with improvements in its ability to target 706 cases for litigation. The issuance of the General Counsel's Manual in early 1976 provided regional attorneys with specific guidance on how to select cases referred from district offices. [83]

Nevertheless, in addition to the recent negative assessments of EEOC's systemic efforts by both GAO and the House Subcommittee, [84] a number of private civil rights organizations and prominent spokespersons have expressed concern over EEOC's continued inability to launch a major systemic litigation effort. For example, the Lawyer's Committee for Civil Rights Under Law has stated that:

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[82] Again, future earnings and benefits expected to result from compliance with prospective terms of relief (such as goals and timetables) are excluded from this calculation. Id.

[83] General Counsel Manual, supra note 26, at Chapter 2, Section I.

[84] GAO report, supra note 2, at 45-61, and Congressional oversight report, supra note 3, at 17, and 34-37.

> The EEOC has been unable to mount and litigate pattern and practice suits since gaining that authority in 1974. As a result, and to avoid further delay during reorganization, pattern and practice litigation authority should be restored immediately to the Justice Department, to be shared with the EEOC for a seven-year period and reassessed during the seventh year. [85]

Similarly, Herbert Hill, National Labor Director of the National Association for the Advancement of Colored People, has commented.

> The EEOC failed as an enforcement mechanism in the five years after Title VII was amended because it was denied adequate leadership and because it was not transformed into an organization whose basic emphasis was upon litigation against systemic patterns of discrimination. The conclusion is inescapable: the EEOC's failure to utilize the litigation powers granted by Congress in 1972, in conjunction with its operating problems, had resulted in the failure of the administrative process to realize the potential of the law. Enforcement of Title VII continued to depend upon private litigants, with all the limitations that this condition implies. [86]

To its credit, EEOC's current administration has openly admitted EEOC's shortcomings in the area of systemic litigation.[87] A new effort to include a workable systemic component in the agency's operations is dependent, in EEOC's current view, not only on revised compliance procedures,[88] but on significantly increased levels of trial experience among agency attorneys. Presently, EEOC estimates that only 30 to 40 of its attorneys are sufficiently trained in trial work.[89]

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[85] Lawyers' Committee for Civil Rights Under Law, Comments on Reorganization of Enforcement of Nondiscrimination in Employment, Aug. 18, 1977, at 4-5.

[86] Hill article, *supra* note 77, at 90.

[87] Memorandum from Alfred Blumrosen to Eleanor Holmes Norton, Chair, EEOC, Outline of Proposed Systemic Program, Aug. 8, 1977 [hereinafter referred to as August 8 Blumrosen memorandum].

[88] See discussion in Section III, Part 2 *infra*.

[89] August 8 Blumrosen memorandum, *supra* note 87, at 3.

EEOC's capacity to monitor consent decrees remains inadequate. The agency has, however, taken some steps to improve this aspect of its enforcement responsibility. EEOC notes that 81 active section 707 cases were transferred from the Department of Justice to EEOC, most of which were consent agreements. EEOC's pattern and practice unit took immediate steps to review compliance with these decrees and, as a result, enforcement or contempt actions have been sought in 30 cases.[90] Since 1975, EEOC has also more closely monitored enforcement of its consent decree with AT&T. EEOC sought to enforce breaches of the agreement in a motion entered on May 13, 1975. On August 20, 1976, the U.S. District Court in Philadelphia sustained EEOC's position, ordering the company to pay $2 million and to step up its affirmative action program to remedy its noncompliance.[91]

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[90] July 22 Robertson memorandum, *supra* note 14,at item 42.

[91] *Id*. at item 43.

Notwithstanding these successes, however, EEOC's limited resources make it difficult to adequately review and monitor all consent decrees. The 1976 reports of both GAO and the Subcommittee on Equal Opportunities found that monitoring and follow-up of consent decrees is still inadequate.[92] The staff report commented that monitoring of court decrees has been carried out primarily by attorneys with initial responsibility for litigation. Although this method assures legal expertise for monitoring the decree, it is unlikely that attorneys with heavy caseloads will have the time or resources to adequately monitor the decrees.[93]

Volume V also criticized EEOC's steel settlement because the settlement contains a requirement that the Government appear on behalf of the industry in the event of private action, which could result in an unfortunate alliance between the Government agencies responsible for enforcing antidiscrimination laws and corporate interests which violate them.[94] EEOC states that although the provision in question has been upheld by courts reviewing the steel decree, EEOC has made it policy not to enter into such provisions in subsequent decrees.[95]

EEOC has also improved its delivery through litigation of relief to individual complainants. As of January 1, 1977, 283 cases had been settled and 194, or two-thirds, of the settlements called for relief in the form of goals and timetables. Back pay awards exceeded $100 million.[96] Two hundred of the 283 settlements were achieved between July 1, 1975, and January 1, 1977. EEOC attributes this increase both to the maturation of cases and to its efforts to strengthen case management. EEOC, according to the General Counsel, is currently achieving between 6 and 10 consent decrees per week.[97]

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[92] GAO Report- Sept. 1976, supra note 2, at 51 and Congressional oversight report, supra note 3, at 37.

[93] Congressional oversight report, supra note 3, at 37.

[94] Volume V, supra note 25, at 560.

[95] July 22 Robertson memorandum, supra note 14, at item 44.

2. Private Litigation:

EEOC does not take sufficient action to ensure that complainants are aware of their options for private litigation. EEOC does not automatically issue "right-to-sue" notices where an investigation cannot be completed in 180 days. EEOC has pointed out that the routine issuance of such notices to complainants who have not asked for them forces individuals to choose between filing suit within 90 days or losing their Title VII rights.[98] It would, however, be possible for EEOC to inform periodically complainants after 180 days of their right to request such letters, thus enabling them to go to court privately if they so desire. EEOC contends, however, that the issuance of right-to-sue letters runs counter to one of the major purposes of the administrative process -- to insulate the judicial system from an excessive amount of Title VII litigation.[99] This argument might be more convincing if EEOC were an administrative enforcement agency possessing cease and desist authority. Under present circumstances it is difficult to perceive the utility in delaying potential litigation. Indeed, lengthening the time from alleged violation to actual litigation may worsen the judicial situation by increasing the time and effort necessary for discovery and related procedures; further, damages are likely to be greater in the event a violation is found.

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[96] Id. at 45.

[97] Interview with Abner Sibal, General Counsel, EEOC, July 15, 1977.

[98] July 25 Blumrosen memorandum, supra note 13, at 7.

[99] Id.

EEOC has recently revitalized its program to support the private bar. Prior to 1976 EEOC contracted with law schools and legal assistance organizations to provide clinical legal education in equal employment opportunity and to train and assist private attorneys in Title VII litigation. The Commission has spent approximately $4 million on such contracts. According to EEOC this has resulted not only in training attorneys to handle Title VII litigation, but also in the filing of hundreds of lawsuits which could not be pursued through EEOC's own litigation resources.[100/]

On June 29, 1976, the Commission voted to fund only existing projects and to phase out the contracts by the end of fiscal year 1977 with the vague explanation that the program needed to be reevaluated. EEOC's reason for this decision was that it believed it had the legal resources, trained personnel, and experience to fully conduct Title VII litigation.[101/] Another possible explanation for this decision, however, is the fact that, at times, EEOC and the private bar have found themselves in competition for the best Title VII cases.[102/] Only July 20, 1977, EEOC voted unanimously to revive private bar funding. EEOC reserved the right to choose the cases which it will litigate itself as part of its contracts under the new program.[103/]

[100/] Congressional oversight report, supra note 3, at 38-39.

[101/] Id.

[102/] Sibal interview, supra note 97.

[103/] Memorandum from Peter Robertson, Director, Office of Federal Liaison, EEOC, to Preston David, Executive Director-Designate, EEOC, July 20, 1977.

E. The Charge Backlog

EEOC's backlog of complaints has continued to increase since 1975. In Volume V it was reported that EEOC had a backlog of 98,000 charges on June 30, 1974. This figure increased to 106,700 on June 30, 1975, 114,200 on September 30, 1976,[104] and stood at 130,000 on April 30, 1977.[105]

In fiscal year 1976 EEOC revised its strategy for allocating resources. The revised strategy allocated 70 percent of field compliance resources to a program for individual relief and 30 percent of field resources to a program for systemic relief.[106]

This 70-30 resource allocation figure was in marked contrast to the 1974 posture of the agency, when Chairman Powell informed the House Subcommittee on Equal Opportunities that only 35 percent of EEOC's resources would be devoted to individual charge processing.[107] Moreover, the 70 percent figure is probably a conservative estimate of what will actually happen. Other projections run as high as 90 percent for individual complaints.[108] To date, no procedure, plan, or resource strategy of EEOC has been able to reduce EEOC's rising backlog.

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[104] Volume V, supra note 25, at 529 and attachment to July 22 Robertson memorandum, supra note 14.

[105] Draft memorandum from Charlotte Frank, Spec. Asst. to the Chair, to Eleanor Holmes Norton, Chair, EEOC, "Backlog Processing Post 1973 Charges," July 14, 1977.

[106] July 22 Robertson memorandum, supra note 14, at item 50.

[107] Congressional oversight report, supra note 3, at 22-23.

[108] Bureau of National Affairs, Daily Labor Report, interview with Eleanor Holmes Norton, at D 1-D 10 (July 13, 1977).

Part 2.

The two major responsibilities of EEOC are to obtain relief for individual victims of employment discrimination and to uncover and remedy broad patterns and practices of discrimination. During the first two months of its administration, EEOC's new management has directed most of its attention toward the development of an improved individual charge processing methodology, and the reorganization of the agency's structure to accommodate that system.[109]

The priority which EEOC has given to these issues is sensible. Only by bringing its Title VII responsibility to process individual charges under control will EEOC be able to effectively take on the burden of more systemic work, as it ultimately hopes to do. EEOC has already developed the outlines of a systemic field compliance program. However, given the resource demands of both its backlog reduction plans and the new "rapid charge processing system," it would appear that unless major appropriation increases are forthcoming, a full scale systemic effort is at least a year or two in the future.

Under the new charge processing system charges will be segregated into two classifications: 1) All charges filed prior to the date on which a field office begins implementing the new system will be handled via a "backlog" plan;[110] 2) All charges received in a field office after the new systems are operational will be treated through a "rapid charge processing" procedure,[111] designed to promote settlement of most cases within 120 days. Both regional offices and regional litigation centers will be abolished. Some administrative functions performed by regional offices will be placed in new field offices created from the current district offices. Other regional office functions will be transferred to headquarters. Legal staff will be assigned to the new field offices. Thus, the only existing field entities once the plan is fully implemented will be offices capable of carrying out the entire enforcement process from intake through litigation.

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[109] Interviews with Preston David, Executive Director-Designate, EEOC, July 25, 1977, and Alfred Blumrosen, Office of the Chair, July 13, 1977.

[110] Backlog memorandum, *supra* note 105.

These new procedural and structural changes will be instituted simultaneously and will be phased in gradually. EEOC anticipates that beginning in early fall, the first three to five district offices will receive new staff and responsibilities. The following pages briefly evaluate the procedural and structural changes the new system creates.

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[111] Draft memorandum from Charlotte Frank, Spec. Asst. to the Chair, to Eleanor Holmes Norton, Chair, EEOC, "Rapid Charge Processing System," undated. /hereinafter referred to as RCP memorandum/.

A. Intake and Early Settlement Attempts

EEOC has adopted new intake procedures, i.e., procedures to be applied at the time a complaint is filed.[112] These include:

- Tighter screening to insure that the complaint falls within EEOC's jurisdiction and that the allegations, if proven, are sufficient to establish a valid Title VII claim.

- Limiting to the individual complainant the allegations of harm done and the requests for relief.

- Obtaining information on minimum settlement terms acceptable to the complainant, and counseling complainants as to the likely outcome.

- Contacting the respondent and attempting to settle cases without further investigation.

EEOC proposes to conduct a detailed interview at the earliest possible point with charging parties. If a complaint is filed in person responses to a questionnaire will also be required. The initial purpose is to establish immediately whether or not jurisdiction exists and, at the same time, to impose a somewhat more stringent requirement on charging parties as to the minimum contents of a valid charge. The extensive interview of charging parties is also intended to assure that the allegations do not go beyond a certain maximum scope. In the past EEOC has issued instructions to field staff in an attempt to narrow the range of complaints once an investigation is underway.[113] This is the first time, however, that a concerted effort has been proposed to narrow complaints at the initial stage of case processing, thereby institutionalizing a narrow scope of inquiry throughout all investigative steps.[114]

112/ *Id*. at 3-5.

113/ EEOC Compliance Manual, Sec. 19.

114/ RCP memorandum, *supra* note 111.

While the results of tighter screening and narrowing of charge allegations cannot be fully assessed until after the system is put into operation, the following are some possible effects:

> - Based upon experience with a similarly tightened intake in New York City, EEOC believes that it can reduce the flow of new charges by 20 percent and narrow the focus of charges it does accept so that the time required to process them will be reduced.115/
>
> - The new system may well serve EEOC's goal of enhancing the likelihood of early settlement, since only one individual's grievance will be at issue, and since damages are likely to be light at this early stage. The new emphasis will be on providing opportunity for resolution without any investigation relative to the merits of the complaint, and this is in marked contrast to existing Pre-Determination Settlement procedures of EEOC.116/ In this regard the realistic counseling of charging parties as to the probable worth of their cases and potential likelihood, size, and scope of remedy is a positive development.
>
> - By eliminating clearly invalid charges, EEOC will be able to potentially process valid charges more expeditiously and with more attention. Estimates vary on the percentage of EEOC charges presently accepted which fail to state a valid claim, are nonjurisdictional, and/or are frivolous. 117/ It would appear, however, that a 20 percent reduction in charge intake might be a conservative estimate if the five elements identified as necessary for a charge by EEOC are strictly adhered to.118/

115/ *Id*. at 4.

116/ EEOC Compliance Manual, Sec. 61.

117/ Congressional oversight report, *supra* note 3, at 27.

118/ RCP memorandum, *supra* note 111, at 4-5.

- If EEOC intake staff are skilled, the intensive interview could be of immeasurable assistance to complainants in framing their complaints. EEOC historically has followed a policy of accepting as a charge almost any allegation related to an employment circumstance. This liberal position was premised on the belief that the agency existed to serve lay individuals, often disadvantaged, attempting to frame complaints without the aid of counsel. For many years, EEOC felt that strict pleading requirements would defeat the intent of Title VII.[119] In theory the new EEOC procedure, however, does not place a burden on the complainant to be more articulate about his or her case. It merely places a greater burden on EEOC staff to assist potential complainants in framing their charges.

- If EEOC intake staff are not sufficiently skilled, however, which was the case in the past, there is a danger that charges often will not be fully articulated. As noted earlier, the professional staff level of intake personnel obviously affects the quality of charge screening.[120] The new EEOC plan calls for a "professionally staffed" intake unit, supervised with senior staff and comprised of equal opportunity specialists rather than lower level technicians. The grade levels of the equal opportunity specialists, however, have not been specified.[121] Given the extensive legal, investigative, and settlement counseling functions which this job will entail, and in view of the critical nature of this function to the remainder of the administrative process, it is important this position be occupied by a senior level equal opportunity specialist.

- The pressure on EEOC staff to hold down the number of charges at intake may result in the rejection of valid complaints.[122] Similarly, the pressure to define charges narrowly may result in exclusion of meritorious allegations.

119/ EEOC Compliance Manual, Sec. 2.1(a).

120/ See discussion on staffing, Section II.

121/ September 6 EEOC comments, supra note 7, at 2.

122/ The Subcommittee on Equal Opportunities stated:

> Careful screening of charges prior to acceptance will substantially reduce the number of non-meritorious or non-jurisdictional charges which find their way into the administrative process. However, any winnowing of charges should be done with clearly defined standards such as prior Commission precedent decisions to avoid wantonly discarding meritorious charges. Congressional oversight report, supra note 3 , at 27.

B. The Fact-Finding Conference

Whenever a charge cannot be settled within the first few days after filing, EEOC plans to send to respondents a request for documents and a brief interrogatory, accompanied by a notice that a fact-finding conference will be held and compelling the attendance of the parties. This conference device is the linchpin on which the success of EEOC's new "rapid charge processing" system turns. The agency estimates that two-thirds of the charges reaching this stage will be resolved at or shortly after the conference.[123]

The concept of using a face-to-face meeting of the parties as a means of shortening the investigation process and providing an opportunity for settlement is not entirely new. It resembles in certain respects grievance arbitration proceedings under collective bargaining agreements, particularly in its abandonment of traditional rules of evidence, and the opportunity it provides the Commission representative to obtain the viewpoints of both sides in an open exchange.[124] The specific conference approach which EEOC is about to implement originates out of experience obtained with a like mechanism at the New York City Commission on Human Rights (NYCCHR) where there is evidence that it was used with considerable success.[125] That experiment was, in turn, an outgrowth of a similar process developed at the New York State Division of Human Rights (SDHR.)[126] The American Arbitration Association's Community Dispute Service, in a recently completed study of the case processing procedures used at the NYCCHR, concluded:

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[123] RCP memorandum, supra note 111, at 8.

[124] Interview with Thomas L. Saltonstall, Coordinator of Program Development-Community Dispute Services, American Arbitration Assoc. July 26, 1977 [hereinafter referred to as Saltonstall interview].

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[125] See attachment D to September 6 EEOC comments, *supra* note 7. The NYCCHR more than doubled its rate of successful settlement (from 20 percent to 42 percent) while reducing its administrative closure rate fivefold (from 32 percent to 6 percent), using this case processing system. See also report of American Arbitration Assoc., Community Dispute Services to the Massachusetts Comm. Against Discrimination, *Observations and Analysis of Case Processing at the New York State Division of Human Rights and the New York City Commission on Human Rights* 27 (May 27, 1977) /hereinafter referred to as A.A.A. Report/ EEOC states that the process has been adopted in Massachusetts. September 6 EEOC comments, *supra* note 7.

[126] Interview with Charlotte Frank, Special Assistant to the Chair, July 15, 1977. EEOC stated that, "The New York State experience demonstrated the need for an 'extended investigation' component which is built into the new EEOC process, and is the reason why the New York City system worked." September 6 EEOC comments, *supra* note 7.

> ...the adoption of this settlement strategy by the New York City Commission constitutes a bold and critical landmark in the field of human rights. Indeed, given current resources and the small percentage of discrimination complaints which ultimately sustain a finding of probable cause, this progressive approach may be the only one by which antidiscrimination enforcement agencies can escape the intolerable delay and inefficiency which currently characterize their operations throughout the United States.[127]

The procedure is clearly appealing in terms of the investigative time and resources which it promises to save. However, given the confrontational nature of the device,[128] a number of potentially serious problems are posed which will require detailed attention from EEOC in order to ensure its successful implementation.

1. Intimidation: There is an obvious risk that more sophisticated respondents may intimidate individual charging parties or, at the least, better articulate their case,[129] thereby overly impressing Commission representatives as to the validity of their position. Also, respondents are more likely to have private counsel available for consultation than are complainants.

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[127] A.A.A. Report, *supra* note 125, at 26-27.

[128] Telephone interviews with Werner Kramarsky, Commissioner, New York State Division on Human Rights, July 19, 1977 and Alex Jackson, Director, Government Employment Section, New York City Commission on Human Rights, Aug. 10, 1977.

[129] A.A.A. Report, *supra* note 125, at 49-51.

Since the vast majority of complaints will be filed against corporate entities the likelihood is that the "respondent" attending the meeting will in fact be the corporation's attorney. EEOC has addressed at least part of this potential problem by requiring all parties to respond on their own behalf, ruling out cross-examination, and providing that all exchanges go through the Commission representative. Nevertheless, the mere presence of counsel with a respondent can impart an aura of legitimacy to the respondents arguments which might cow insecure or inarticulate complainants.[130]

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[130] EEOC, however, believes that the risk of intimidation is minimal. EEOC stated:

> With respect to the issue of intimidation, the procedures for conduct of the fact-finding conference provide that the investigator is to be in charge at all times and that the investigator is conducting an inquiry into an alleged violation of federal law. The fact is that New York and other 706 agency experience demonstrates that with adequate training and staff selection of people as fact-finders, the conference does not get out of hand. Investigators will be instructed in detail in the techniques, utilized successfully in New York City, to secure information, encourage settlement and protect charging parties from intimidation. Instruction include: (1) training manuals of over 200 pages describing the process in step by step detail with examples, sample dialogues, and descriptions of techniques; (2) training at headquarters beginning September 6 conducted by experienced trainers using simulations, videotape, role-playing and other exercises including drafting a complaint, preparing settlement, etc.; (3) training of supervisors so they can provide day-to-day guidance to staff. Techniques for dealing with intimidation are incorporated into the instruction and include suggestions for dealing with respondent attorneys who attempt to gain control, restrictions on number of people respondent can bring, rules for participation which prohibit respondent cross-examination of charging party, etc. September 6 EEOC comments, supra note 7.

2. Training and Skill of Commission Representatives: The Commission representative must be trained intensively. Not only will Commission compliance personnel need to learn a new procedural process, they will also need training in how to handle a potentially volatile adversarial confrontation. The Commission representatives must be capable of balancing the psychological forces arising from the face to face meeting of complainants and respondents.

EEOC originally indicated to this Commission that all investigators would conduct such conferences.[131] This may prove unwieldy. It is not very likely that all compliance personnel, occupying a range of grade levels from GS-5 to GS-12, will have the capacity to perform at this level. Some individuals may be adequate investigators but lack the skills necessary to act in the dual role of fact finder and mediator. The Commission clearly intends for this conference to serve a conciliatory as well as an investigatory purpose.[132] This will require representatives who not only are capable of evaluating and sifting facts and arguments, but creative and flexible arbiters who can discern the grounds on which both sides might reach accord, and lead them there.[133]

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[131] Frank interview, *supra* note 126.

[132] RCP memorandum, *supra* note 111, at 8.

[133] It appears that EEOC may now be considering limiting the position of factfinder to selected individuals within field offices. EEOC has recently stated that: "Selection criteria for these positions were designed by headquarters staff and Model Office staffing for these positions has proceeded accordingly. Criteria were ability to work with multiple participants, think quickly, and project a strong presence." September 6 EEOC comments, *supra* note 7, at 4.

The training process for this function is still under development at EEOC.[134] Of all new Commission training plans this one will require the greatest outside scrutiny.

3. Control and Uniformity: As indicated earlier, the technique is basically being transported to EEOC from the NYCCHR. A number of differences exist between these two agencies which could alter the effectiveness of the procedure in its new setting. Clearly, the procedure demands close oversight and review on a regular basis. In New York City this was not exceptionally difficult to do. The NYCHHR had a centralized location where all such conferences were held. Top echelon managers and program specialists were always within easy reach if problems arose or advice on the appropriate action to take was needed by the representative. Essentially, the people who had built the device were on the premises. Second, the NYCCHR had a limited caseload and intake.[135] This made it possible for the agency to devote a good deal of supervisory attention to the procedure on a case by case basis.

EEOC is obviously in a different posture. The agency has a vastly larger caseload. Moreover, under present EEOC plans top field office personnel are going to be involved not only in directing the new charge processing system, in which the fact-finding conference is just one part, but also in backlog management and systemic program implementation. It is

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134/ Training plans are discussed in note 130, supra.

135/ Telephone interview with Ernest Jones, Director of Investigations, New York City Commission on Human Rights, Aug. 8, 1977.

uncertain whether sufficient field resources will be available to oversee this new procedure adequately under these circumstances.

Also, EEOC, unlike the NYCCHR, has a multipilicity of offices. The issue of maintaining control and uniformity of application from headquarters on a procedure so inherently malleable could prove a problem for the agency.136/ Absent regular headquarters oversight, some field offices might evolve a wholly settlement oriented philosophy, to the exclusion of fact finding; others might use it primarily to obtain information without taking full advantage of the process as a conciliation tool.

EEOC commented:

> Maintenance of control and uniformity in any new program implemented nationwide does indeed pose a problem. However, the techniques to assure that the program evolves properly and is properly supervised are already in place. The basic technique is the "model office" approach, which will enable the Commission to install the new procedures with great care so that the proper approach to it is built in from the beginning. Secondly, careful headquarters monitoring will take place using a "desk officer" approach. Thirdly, the new management information and accountability system is designed as an early warning system to identify any office where procedures are not producing expected results. 137/

136/ Kramarksy interview, supra note 128. The New York State Division on Human Rights has in fact discontinued its use of these face-to-face conferences. Mr. Kramarksy indicated that the agency was unable to maintain uniformity in 13 separate regional offices, and that the process was not resulting in significant saving of investigation time or higher rates of settlement.

137/ September 6 EEOC comments, supra note 7, at 4.

4. Image of EEOC: The EEOC has a serious image problem.[138/] Many, if not most, respondents view the agency as an advocate of minorities and women rather than as a neutral investigating body.[139/] There is a definite risk that the fact-finding conference, unless expertly conducted, will reinforce this perception. The image of EEOC as the complainant's advocate is most likely to be projected when the respondent is a corporate executive, accompanied by counsel, and the complainant is less educated, without counsel, and thus dependent on EEOC to articulate his or her case. While it is incumbent upon the Commission representative to act in a neutral fashion,

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[138/] Interview with David Copus, Attorney, Rodgers, Connolly and Barlow (formerly Acting Chief, Special Investigation and Conciliation Division, EEOC), July 21, 1977. EEOC acknowledges this problem. It wrote to this Commission:

> The EEOC image problem is important and is well recognized as such by EEOC's new management. The required professionalism will be a basic part of EEOC retraining program and will be carefully monitored. The CRC document does not give adequate attention to the role of conversion training as the Commission views it, namely that it is as important a part of the reforms as the new charge processing system. Commissioner Norton stressed this in her testimony that "systematic training of staff will be necessary if the reforms I have described are to take hold and prove effective." The professionalism necessary to indicate the proper attitudes to respondents and complainants alike is a critical part of the conversion training for the new system. September 6 EEOC comments, *supra* note 7.

[139/] GAO Report - Sept. 1976, *supra* note 2, at 15-17.

it is also imperative that the complainant's position be tenable. In such situations the EEOC representative may have no choice but to favor complainants and assist them in presenting their cases. The neutrality of the fact-finder may be jeopardized in these instances.[140]

C. New Reasonable Cause Standard

EEOC has opted for a much stricter evidentiary standard for findings of reasonable cause. Previously, EEOC had no uniform standard for what constituted reasonable cause.[141] In some instances complainants had to supply little or no evidence in support of their allegations before the burden was shifted to the respondent to prove that they were untrue. Hereafter, reasonable cause will mean that a case is, in EEOC's view, worth litigating, either by EEOC or in the alternative by the private bar.[142] This change in the agency's internal operating definition of cause is fully 5 years overdue.

The new reasonable cause standard being adopted by EEOC is an absolute necessity if the agency's enforcement efforts are to achieve credibility.

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[140] A.A.A. Report, *supra* note 125, at 51 and Saltonstall interview, *supra* note 124.

[141] In 1972, EEOC received enforcement authority. The receipt of this new power should have alerted EEOC to tighten the quality of evidence used in support of all cause findings. By 1972, however, EEOC had been operating for 8 years under a loose evidentiary standard, and the impact the new authority should have had on this standard was either not comprehended or ignored in EEOC's compliance offices.

Two other factors probably contributed to the postponement of a revision in the reasonable cause standard. First, the 1972 statutory change did not require EEOC to litigate every case in which cause was found and conciliation failed. If it had, the present change might well have occurred in 1972. Second, after EEOC got litigation authority it kept its newly enlarged legal staff segregated from compliance personnel. Thus, the attorneys were not available to retrain the compliance staff as to the concept of reasonable cause.

[142] Memorandum from Alfred W. Blumrosen, Office of the Chair, to Eleanor Holmes Norton, Chair, EEOC, "Recommendations for Improving the Commission's Process, Structure and Systemic Programs," July 15, 1977 (revised July 18, 1977) at 4-8 [hereinafter referred to as July 15 Blumrosen memorandum].

The decision to make the cause finding the equivalent of a determination that the case is worth litigating should serve to markedly improve the level of successful settlement in conciliations because respondents will know that they are faced with almost certain lawsuit in the event that conciliation is not successful. It is worth noting as well, that this change should help to prepare EEOC for administrative enforcement authority should Congress determine to vest additional powers in the agency.[143]

D. Backlog Plans

EEOC's plans for dealing with its 130,000 case backlog are essentially a modification of a number of procedures previously attempted for short periods of time.[144] The essential difference will be, according to EEOC, that these procedures will be used until the backlog is eliminated[145] whereas in the past they have been used only sporadically to achieve short term reductions in caseloads. EEOC has estimated that 50 percent of its current district office staff will be required for a period of 1.5 years to eliminate the backlog, assuming no increase in the current filing rate.[146]

Two specific features in EEOC's plans for backlog merit positive comment. 1) EEOC has indicated that, notwithstanding the original allegations of charges presently on file, it intends to narrow the scope of its investigations to the specific harm done to the individual complainant, unless the charge raises systemic issues, and EEOC believes an expanded investigation will be a cost effective utilization of resources. Charging parties whose cases have already been assigned for investigation will be informed of the new approach, and in the event that this position is unsatisfactory to charging parties they will be immediately provided with the option of obtaining a right-to-sue letter. 2) The great majority of complaints will be conciliated solely on the basis of terms deemed satisfactory to the complainant. The standard will apply both before and after determinations of cause. Failure to address systemic issues will no longer be a basis for EEOC's rejection of settlement offers which the charging party is prepared to accept. Both of these procedures are new, and they should improve the speed of charge processing and the rate of successful settlement.

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[143] Cease and desist authority for EEOC has also been recommended in a proposal prepared by the Congressional Black Caucus (Background Paper on Plan for Executive Reorganization of Federal Employment Rights Agencies-Draft, undated) and in the draft bill for Title VII Reorganization introduced by Reps. Edwards and Drinan (H.R. 3504).

[144] Backlog memorandum, supra note 105, at 1.

[145] See discussion in Section F infra regarding the issue of whether or not EEOC can or should claim that it can "eliminate" the backlog.

[146] Backlog memorandum, supra note 105, at 2.

EEOC intends to seek a "terminal no-fault settlement" in cases where a no cause determination appears to be likely based on available evidence but has not been finalized.[147/] In such situations EEOC plans to inform complainants of its evidentiary findings and consult with them as to whether or not they have any additional evidence to present and to ascertain from complainants the minimum acceptable relief under the circumstances.[148/] Respondents will then be approached for another attempt at conciliation.

This procedure bears close scrutiny. The agency could be viewed as acting in collusion with complainants in a manner which appears to violate administrative investigatory neutrality. Moreover, there is a danger that the impact of the procedure, once it is a known fact in the respondent community, will be to severely limit EEOC's ability to settle any cases prior to a formal finding. Should respondents come to believe that the agency's pre-finding settlement efforts are merely a smoke screen for no cause cases, they might refuse all

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[147/] *Id.* at 8. This procedure will apply not only to charges currently in EEOC's backlog, but to all future charge processing as well. Telephone interview with Alfred Blumrosen, Special Assistant to the Chair, EEOC, Sept. 28, 1977.

[148/] See discussion of this procedure and the draft section of EEOC's Compliance Manual on Pre-Determination Interviews in September 6 EEOC comments, *supra* note 7, at 5-6.

pre-finding conciliation attempts, thus defeating EEOC's own goal of rapid early resolution.[149]

EEOC, however, believes that these potentially negative results can and will be avoided. The agency notes first that the pre-determination interview is in fact still a part of an open investigation, and inquiry as to acceptable settlement terms at this late stage of investigation are but a continuation of settlement oriented techniques which are to be applied throughout the investigatory process.[150] Moreover, EEOC has pointed out that since the settlement terms requested of respondents in these latter stages of investigation will almost invariably represent a major reduction in relief demands from the complainants' original claims, respondents will have de facto notice that

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149/ Such a procedure goes to the heart of the EEOC image problem. It has been expressed that this is exactly the kind of activity which serves to portray EEOC as biased in favor of complainants irrespective of the merits of their charges. Copus interview, supra note 138.

150/ September 6 EEOC comments, supra note 7, at 5-6. EEOC stated:

> The Civil Rights Commission concern for the issue is legitimately based on an abbreviated explanation of a completely proper settlement process. In the investigation, there will be a required interview with both parties prior to the conclusion of the investigation. At the time of this interview, the investigator will have developed a sense of which side has the stronger case, and will give each party the opportunity to strengthen their side of the case, or rebut the evidence presented by the other side. At the same time, the investigator will further explore the interests of both sides in settling the case in light of the evidence then available. This continued search, not only for evidence on the cause issue, but for an acceptable area of settlement, is explained throughout the backlog briefing paper. (See Overview, and sections (a), (1), (6), (c), (e)). Read in light of the constant quest for settlement that is emphasized at every stage of the new process, the provisions of the backlog paper, (f) (1) and particularly (f) (2) were intended to relate to the actions of the investigator taken before the judgment on the case had "frozen" into a conclusion that it was either a "cause" or "no cause" situation. Id.

EEOC and the charging party are negotiating from a relatively weak position. The concept that respondents are likely to be deceived by EEOC is therefore rejected by the agency. Moreover, EEOC notes that respondents may obtain genuine benefit from settling cases for minimal terms with charging parties who have weak cases. Even complainants with poor cases often seek right to sue letters, tying up respondents (and the courts) in additional and costly litigation. Many respondents are pleased to escape such results by entering into relatively cost free settlements (e.g., purging negative references from an employee's personnel file).[151/] This argument is convincing to a point. Balanced against it, however, is the possibility that successful EEOC efforts to obtain some kind of relief for individuals with poor cases may in fact generate many more charges of a similar ilk. Ultimately this can work to the disadvantage of those complainants with meritorious cases, since EEOC resources will be diverted to weaker cases. Only actual field experience will determine whether or not the procedure can be implemented without undermining the agency's credibility.

Another possible difficulty is that district offices may resist the elimination of their backlogs. The district offices have never had a meaningful program of systemic work. Major activity in areas other than individual charge processing has historically been the preserve of elite groups of employees, either in special Commissioner's task forces, the Special Investigations and Conciliations Division of the Office of Compliance (formerly the National Programs Division), or the General Counsel's Section 707 Unit. As a result, district office personnel may have come to believe with some justification that their raison d'etre was and is the presence of a large volume of individual charges. This perception translates into a fear by field compliance

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[151/] Telephone interview with Charlotte Frank, Office of the Chair, EEOC, Sept. 16, 1977.

personnel that elimination, or even substantial reduction, of the total number of charges jeopardizes their jobs.[152] EEOC's current plan for integrating legal resources into all field offices, and simultaneously creating a systemic program in each, may in part assuage this concern. However, present plans call for three separate and distinct units in the field offices, one to work on backlog, one for new individual charge processing, and one for pattern and practice activity.[153] These separate units may once again raise the specter of elite teams for systemic work. If it is to avoid resistance to its new plans by field staff, EEOC must convince its field compliance personnel that this separation of functions is meant to be temporary (perhaps by rotating personnel among the three functions), and that no one will eliminate his or her job by helping to eliminate the individual charge backlog. EEOC has indicated that it intends to achieve this by carefully integrating systemic work for all staff in all field offices over a period of time.[154]

152/ In this same vein, field staff resistance to reduction in charge workload has been cited by GAO as a cause of EEOC's inability to effectively delegate to and rely upon charge processing by State and local agencies. GAO Report - Sept. 1976, *supra* note 2, at 25.

153/ David interview, *supra* note 12.

154/ EEOC has stated that:

> EEOC anticipates that as the "backlog" is reduced, staff will be shifted to current charge processing and systemic work. That systemic work will not be an "elitist" activity. Systemic work will be performed by every office just as charge processing now is. Careful and thorough back-up from headquarters, very gradual phase-in of systemic cases, and the most thorough training should facilitate the successful implementation of systemic work in all the offices of the Commission. This will enable the Commission to keep Commissioner Norton's promise, made in her Senate confirmation remarks, that she would seek to free staff and resources now going to individual cases for high-impact personnel reform work. September 6 EEOC comments, *supra* note 7, at 6-7.

E. New Field Office Structure

EEOC has decided to eliminate both regional offices and regional litigation centers. Their staffs will primarily be shifted to the new field offices, created from the district offices. This radical structural surgery is directly responsive to the recommendations contained in a number of independent evaluations of EEOC.[155]

These changes are most significant in that legal staff will now work directly with field office compliance personnel in the processing of charges of discrimination.[156] If close working relationships between equal opportunity specialists and attorneys ensue, this should enable EEOC to successfully implement its new reasonable cause standard in a relatively short period of time.

The merger of the compliance and legal staffs of the agency clearly fulfills the Congressional intent. The primary reason for creating new litigation enforcement authority in the 1972 Act was to lend credibility to EEOC's conciliation process.[157]

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[155] These structural problems are cited in the GAO Report - Sept. 1976, Congressional oversight report and Volume V. GAO Report - Sept. 1976, *supra* note 2, at 35 and 65; Congressional oversight report, *supra* note 3, at 16-17 and Volume V, *supra* note 25, at 671.

[156] Blumrosen interview, *supra* note 109.

[157] Senate Comm. on Labor and Public Welfare, *Legislative History of the Equal Employment Opportunity Act of 1972*, 92 Cong., 2d Sess. (1972), at 68-69 and 414.

The housing of attorneys in the field offices should also make it possible for investigators to obtain substantially increased support in their efforts to gather information, since subpoena, subpoena duces tecum, preliminary injunctions, and temporary restraining orders will presumably be more readily issued, defended, and enforced. Similarly, conciliators will be likely to benefit from counsel in drafting appropriate terms of settlement on all charges, individual and systemic, at all stages of the settlement process.[158/]

Major physical alteration of EEOC's field operations will undoubtedly create moderate and, in some cases, severe hardship on individual employees. In this regard the sensitive remarks of the new EEOC Chair to the House Subcommittee on Equal Opportunities are praiseworthy.[159/] EEOC hopes to minimize personnel disruptions as it implements its changes. In this regard the initial use of only three to five model field office demonstrates positive administrative, as well as program, planning.

[158/] Sibal interview, supra note 97.

[159/] Norton testimony, supra note 20, at 4-5.

F. General Observations on EEOC's Individual Charge-Processing Responsibilities

No one could take issue with the need for better management within the EEOC. It is nevertheless true, if not widely recognized, that better management and improved charge-processing mechanisms do not guarantee that the number of individual charges at the agency will be brought under control. Many of the criticisms leveled at EEOC by Congress and the media concerning the backlog's size and growth are in this sense ill-focused.

Some statistics may be enlightening in this regard. In the period from fiscal year 1972 through fiscal year 1973, EEOC increased the number of charges it resolved by 50 percent, although the agency's resources increased by only 39 percent. In the period from fiscal year 1973 to 1974, these figures were, respectively, 80 percent and 39 percent, and in fiscal year 1974 to 1975, 66 percent and 24 percent.[160] The fact is that EEOC, despite all its internal problems during this 3-year period, annually improved its performance in resolution of complaints at a pace far in excess of its appropriations increases. Nevertheless, charge intake increased at an even faster rate, and the backlog continued to grow. The statute creates an individual right to file a complaint and it requires EEOC to investigate that complaint. Absent a statutory change reducing EEOC's responsibilities for individual charges, the agency cannot in fairness be faulted for the backlog simply on the basis of its total size.

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[160] Statistical information supplied by Helen Stellman, Acting Director, EEOC Office of Financial Management.

Furthermore, the assumption that a better charge-processing system will automatically reduce the backlog may be fallacious. This Commission has noted that in one instance positive public perceptions of EEOC apparently tended to increase the flow of charges to the agency.[161] While the two primary goals of EEOC's proposed rapid charge-processing system are greater speed and a higher rate of successful settlement, prior experience indicates that public awareness of success with a new system might lead to a still greater influx of complaints, potentially swamping even a vastly improved and more efficient agency.

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[161] In *Volume V* it was observed that:

> Even with drastic increases in the agency's investigation rate, there is some doubt that the backlog can ever be substantially reduced. As EEOC obtains broad sweeping consent decrees and settlements, there is evidence that the number of charges tends to increase rather than decrease. Since the AT&T settlement, for example, charges against the corporation and its affiliates have increased by approximately 60 percent. A similar effect can be expected as EEOC successfully completes lawsuits and obtains voluntary agreements. It is this prospect which gives weight to the position that the agency should concentrate its efforts on attacking broad patterns of systemic discrimination, rather than the hopeless task of eliminating the backlog of individual charges, which are not necessarily the most valid indicators of the existence of discrimination. *Volume V*, *supra* note 25, at 532-533.

The fact is, however, that EEOC still appears from some of its public pronouncements to be promising to remedy the backlog problem in terms of the raw numerical total.[162] This is something it may not be able to do, even with the best management, staff, and new techniques. It would be more realistic if EEOC made clear that it will do the best it can within its resource limitations to get to charges as rapidly as possible, promising that once processing begins, prompt resolution will follow. In her testimony of July 27, 1977, EEOC's new Chair appears to have taken note of the potential danger in offering blanket promises to eliminate the backlog. Ms. Norton noted that "backlog" in the agency is in fact "inventory" without reference to the age of cases, and that the figures are "meaningless."[163] She further indicated that the backlog will be stabilized and controlled--not eliminated--by treating new charges through the RCP system, while scaling down the present backlog.[164]

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[162] The Backlog memorandum, for example, speaks in terms of "eliminating" the backlog in about one and a half years. Backlog memorandum, supra note 105, at 2. In fairness, however, the same memorandum also speaks of "reducing the backlog to manageable proportions as quickly as possible." Id. at 1.

[163] Norton testimony, supra note 20, at 14-15.

[164] September 6 EEOC comments, supra note 7, at 7.

Consistent with such an approach would be a policy permitting, where necessary, the prioritizing of charges for assignment irrespective of the date they were filed, based on the office director's judgment as to their importance and probable merit.[165]

Ironically, the "rapid charge-processing" system offered as the key factor in the solution of EEOC's charge-processing troubles may, unless modified, turn out to be more of a problem than a cure. The underlying premise of rapid charge processing is action on all charges as soon as they arrive. In the event that complaints do come in faster than EEOC can react, the whole system could collapse.[166]

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[165] The Dept. of Labor, for example, utilizes such a procedure in the processing of Equal Pay Act complaints. Volume V, supra note 25, at 442.

[166] According to EEOC:

> This is not likely to happen because of (1) greater selectivity in taking charges, (2) more rapid processing of charges and (3) better use of investigative time enabling greater productivity. This matter will be monitored carefully in the model and other offices. If additional resources are needed to deal with any increase in new charges once the agency is operating efficiently, such resources will be requested and, based on a record of improved productivity, EEOC would anticipate receiving such funding increases. September 6 EEOC comments, supra note 7, at 7.

IV. State and Local Agencies

EEOC's relationship with State and local Fair Employment Practices Agencies is far less productive and mutually beneficial than it should be. First, EEOC has only narrowly used its authority to fund State and local agencies. In fiscal year 1975, EEOC provided 3.5 million dollars to State and local agencies pursuant to Section 709(b) of Title VII.[167] In fiscal year 1976, the level of funding was increased to 6.0 million, and stayed at this mark through fiscal year 1977.[168] Almost all of this money continued to be used by EEOC in an attempt to get these agencies to process charges which were part of EEOC's caseload. It has been observed that EEOC's use of funds for these agencies is too rigid. Both GAO and the House Subcommittee on Equal Opportunities have concluded that a more flexible approach is required to accommodate needed technical assistance, training, and other programs at State and local agencies which could have an impact on compliance with Title VII.[169] Indeed, Title VII authorizes EEOC to provide funding for a wide variety of purposes. Section 709(b) states that EEOC may:

> ...engage in and contribute to the cost of research and other projects of mutual interest undertaken by such agencies. . .[170]

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[167] Volume V, supra note 25, at 563.

[168] July 22 Robertson memorandum, supra note 14, notes made on copy of Volume V, at 563.

[169] GAO Report - Sept. 1976, supra note 2, at 25-26, and Congressional oversight report, supra note 3, at 17 and 31.

[170] 42 U.S.C. § 2000e - 8(b) (Supp. V, 1975).

Secondly, EEOC has not effectively implemented its decision to use State agencies as a charge processing mechanism. A good example of this failure is the fact that EEOC district office staff review every State or local agency resolution rather than periodically evaluate a sample of the agency's work.[171/]

This represents a costly and potentially wasteful use of resources. For example, a recent analysis conducted by the New York Regional Office of approximately 500 district office reviews of State agency findings produced the following statistics. Of all charges in the sample, approximately 20 percent were rejected by the EEOC district office. Rejections of State agency resolutions were, almost without exception, "no cause" situations. Each of these cases (about 100 in all) was reinvestigated by EEOC. Eighty percent of these reinvestigated cases resulted in EEOC issuing its own no reasonable cause findings. Of the remaining group, exactly one case was resolved with relief for the complainant, amounting to $160.[172/]

[171/] This was recommended in Volume V, *supra* note 25, at 670.

[172/] Telephone interview with Edward Mercado, Regional Director, N.Y. Regional Office, EEOC, Aug. 10, 1977.

EEOC's future plans for its relationship with State and local agencies are not yet fully developed. The agency has broadly indicated a number of important program areas in which it intends to make changes or institute new policies. An effective role for State and local agencies pursuant to sections 706(c) and 709(b) of Title VII is essential if EEOC is to improve as an enforcement agency.

In her testimony before the House Subcommittee on Equal Opportunities, Eleanor H. Norton indicated that in her view State and local agencies were "associates in a national anti-discrimination effort," and were not to be treated as either "adjuncts of the EEOC [or] unrelated institutions." Specific early examples of her support for better relations with State and local agencies are her commitments to include these agencies in future EEOC training programs, and to the development of a universally acceptable national employment discrimination charge form.[173]

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[173] Norton testimony, *supra* note 20, at 30.

EEOC is anxious to assure that the State and local agencies' operations mesh with EEOC's plans for charge processing, particularly under the new rapid charge processing system. In furtherance of this goal EEOC has announced that:

> The Commission will have agreements granting it the right to process charges when they are received without waiting for the expiration of the sixty day period or obtaining a waiver from the 706 agency so that the fast processing procedures will not be delayed.[174]

As EEOC describes its current plans for State and local agencies:

> /the/ worksharing concept is based on a joint EEOC/706 agency decision as to what the 706 agency can handle and an advance waiver of all the remaining cases so as to avoid the 60-day deferral delay. The agreement describes precisely the basis for identifying which specific charges will comprise EEOC's share and, indeed, without it, the new charge-processing systems would build in backlogs that accumulate because of current waiver procedures. The arrangement we will use will enable the states to deal with the share of the workload which they are capable of handling, and to avoid delay in the cases which they cannot reach by having the EEOC deal immediately with the "excess."[175]

EEOC's appropriation for funding State and local agencies in fiscal year 1978 is $10.4 million. This is a 73 percent increase over each of the previous two years and amounts to more than 13 percent of EEOC's total 1978 budget, which is 77,050,000.[176] The size of this appropriation emphasizes the need for EEOC to plan its State agency program carefully.

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[174] RCP memorandum, supra note 111, at 15. A 706 agency is a State or local agency which EEOC has designated as qualified to process charges under section 706 of the Civil Rights Act of 1964, as amended.

[175] September 6 EEOC comments, supra note 7, at 7.

[176] Telephone interview with Helen Stellman, Acting Director, Office of Financial Management, EEOC, Aug. 18, 1977.

V. Other Activities

A. Coordination

EEOC has been more successful in coordinating with other Federal agencies on a bilateral basis than through the Equal Employment Opportunity Coordinating Council. Although EEOC did agree with the other four member agencies of the Equal Employment Opportunity Coordinating Council (EEOCC) on the issue of affirmative action guidelines for State and local governments,[177] it has generally found that forum to be ineffective as a coordinating vehicle for the Federal Government.[178]

EEOC has informed this Commission that since 1975, its Memorandum of Understanding with the Department of the Treasury's Office of Revenue Sharing (ORS) has been quite effective. EEOC has stated that:

> when cause is found against an employer which is a Revenue Sharing recipient agency of State or local government Revenue Sharing will communicate directly with the State or local government reminding them of their nondiscrimination obligation under the Revenue Sharing statute and informing them that the Office of Revenue Sharing is very much interested in the results of the conciliation with EEOC. While no statistics are available, a telephone survey several months ago of a sample number of District Offices indicated a perception that this participation by Revenue Sharing had made conciliation easier with State and local governments.[179]

EEOC also believes that it has made some progress in dealing bilaterally with the Department of Justice in efforts to resolve disputed points concerning uniform Federal guidelines on employee selection procedures.[180] This issue was a stumbling block when it was before the EEOCC.

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[177] These guidelines are discussed in Chapter 6, *infra*.

[178] July 25 Blumrosen memorandum, *supra* note 13, at 15.

[179] July 22 Robertson memorandum, *supra* note 14, at item 27.

[180] *Id*.

B. Voluntary Programs

EEOC's Voluntary Compliance Program has made little progress in obtaining agreements with respondents. This situation may be due, in part, to the location of the Office of Voluntary Programs field units within regional offices, separating them operationally from the compliance activities carried out in the district offices.

From March of 1975 through July 1977 the Office of Voluntary Programs has obtained only two voluntary agreements. One agreement was with the City of Tampa, Florida, in May 1976 and the other with Baltimore Gas & Electric Co. in July 1976.[181]

The reorganization plan adopted by EEOC on July 20, 1977 will functionally integrate the regional and district offices and thus it appears that any voluntary agreements will be designed by the compliance staff in the new field offices.[182]

181./ Telephone interview with John Maddox, Chief Technical Assistance Branch, Office of Voluntary Compliance Programs, EEOC, July 16, 1977.

182/ July 15 Blumrosen memorandum, supra note 142, at 4-8.

Chapter 5

DEPARTMENT OF JUSTICE (DOJ) - CIVIL RIGHTS DIVISION (CRD)

EMPLOYMENT SECTION

Introduction

This chapter assesses the role which the Employment Section has played in the enforcement of Federal equal employment opportunity law. It covers a period of about eight years, from the Section's creation in 1969 through the summer of 1977.

As of fall 1977, it had become apparent that both Attorney General Griffin B. Bell, and Assistant Attorney General, Drew S. Days, III, both appointed in early 1977, were providing vigorous support to the Employment Section. This support holds promise for strengthening the Section's enforcement role in the future and it is therefore highlighted in this introduction.

Of particular significance is the apparent resolution of long standing disputes between the Civil Rights Division and the Civil Division at the Department of Justice. For years the Civil Division had taken positions on equal employment law which provided less protection to Federal employees with discrimination complaints than was afforded to employees in the private sector by the positions espoused by the Civil Rights Division. On August 31, 1977, the Attorney General issued a memorandum to all United States attorneys and Federal agency general counsels which states that the Federal Government will hereinafter apply the same equal employment opportunity principles to its own employment practices as it has imposed and will continue to impose on private employers and State and local governments.

In addition, within the Civil Rights Division there is also a new commitment to better organization. In October 1977, the Assistant Attorney General for Civil Rights submitted to the Department a plan which would consolidate the Division's equal employment litigation functions, with the exception of appellate work, in the Employment Section. At the time of the proposal, both the Education and Federal Programs Sections of the Division retained responsibilities for litigating employment cases involving education and federally assisted programs.

I. Responsibilities

A. Background

The Employment Section of the Civil Rights Division of the Department of Justice was at one time the major unit of the Federal Government bringing lawsuits alleging unlawful employment discrimination.[1] Until March 1972, the Attorney General was solely responsible for the enforcement of Title VII of the Civil Rights Act of 1964[2] and had exclusive power to bring suits alleging violations of Title VII.

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[1] This chapter focuses solely on the Employment Section of the Civil Rights Division. It is the only unit in the Department with responsibilities exclusively related to enforcing equal employment opportunity law. Interview with David L. Rose, Chief, Employment Section, Civil Rights Division, Department of Justice, Sept. 6, 1977 /hereinafter referred to as September 6 Rose interview/. There are, however, several units within the Department of Justice which have, among their other responsibilities, equal employment enforcement duties. These units are discussed in Section IV, *infra*.

In response to a draft of this chapter which was sent to the Department of Justice for its review, the Assistant Attorney General of the Civil Rights Division wrote to this Commission:

> I am grateful that you sent us the draft chapter on the Employment Section of the Civil Rights Division. The chapter impresses me as a careful and able study.
>
> I am concerned lest there be any misunderstanding about the Division's willingness and ability to expand the Employment Section in order to meet growing responsibilities.
>
> We have recommended that this Department's authority to bring suits to eliminate and correct a pattern or practice of employment discrimination in private sector cases be restored. In addition, I am now in the process of reorganizing the Division to unify responsibility for employment litigation in the Employment Section. Whether pattern or practice authority under Title VII is restored or not, this Division is committed to ensuring that the Employment Section has adequate resources to meet its responsibilities, within the limits prescribed by Congress.
>
> In my judgment, the extensive experience and high degree of competence of the staff of the Employment Section provide a solid foundation for its growth without compromising its high standards.
>
> Again, I appreciate the thoughtful attention to the Civil Rights Division's work which your chapter reflects. Letter from Drew S. Days, Assistant Attorney General, Civil Rights Division, Department of Justice, to Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights, Sept. 27, 1977.

Under section 707 of the Civil Rights Act of 1964, the Attorney General was vested with the authority to bring civil actions against private employers engaging in pattern or practice discrimination. The basic powers of the Attorney General under section 707 were as follows:

> Whenever the Attorney General has reasonable cause to believe that any persons or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.[3]

In addition, the Attorney General could act as intervenor in private suits alleging individual acts of discrimination,[4] and pursuant to section 705 (g)(6), act on matters referred by the Equal Employment Opportunity

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[2] Civil Rights Act of 1964, Title VII, § 706, 78 Stat. 259 (1964).

[3] Civil Rights Act of 1964, Title VII, § 707, 78 Stat. 261 (1964).

[4] Under section 706, the Attorney General was authorized to intervene in civil actions of general public importance. Section 706 states, "Upon timely application, the court may, at its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance." Civil Rights Act of 1964, Title VII, § 706, 78 Stat. 259 (1964).

Commission (EEOC). Section 705(g)(6) stated that EEOC had the power:

> ...to refer matters to the Attorney General with recommendations for intervention in a civil action brought by an aggrieved party under Section 706, or for the institution of a civil action by the Attorney General under Section 707, and to advise, consult, and assist the Attorney General on such matters. [5]

In 1972, amendments to Title VII transferred to EEOC the Attorney General's authority to file pattern or practice suits against private employers.[6] The transfer was to become effective in 1974. From 1972 to 1974, the two agencies exercised coextensive jurisdiction.[7] The pertinent language in the amendments reads:

> (c) Effective two years after March 24, 1972, the functions of the Attorney General under this section shall be transferred to the Commission....The Commission shall carry out such functions in accordance with subsections (d) and (e) of this section.
>
> (d) Upon the transfer of functions provided for in subsection (c) of this section, in all suits commenced pursuant to this section prior to the date of such transfer proceedings shall continue without abatement, all court orders and decrees shall remain in effect, and the Commission shall be substituted as a party for the United States of America, the Attorney General, or the Acting Attorney General as appropriate.
>
> (e) Subsequent to March 24, 1972, the Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission.

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[5] Civil Rights Act of 1964, Title VII, § 705(g)(6), 78 Stat. 259 (1964)

[6] 42 U.S.C. § 2000e-6 (Supp. V, 1975).

[7] *Id*.

It has been alleged that the Department of Justice did not adequately use its pattern and practice authority prior to the 1972 amendments. Herbert Hill, Labor Director of the National Association for the Advancement of Colored People, was very critical of the fact that few suits had been filed by the Department of Justice and doubted whether the few suits which were litigated had serious impact on enforcement. He stated:

> In reality, however, litigation by the Attorney General under Title VII was not a major or an effective enforcement method because the Justice Department filed so few suits and even settled a number of those prior to trial, obtaining only minimal benefits for the complainants. The complicated and time-consuming nature of section 707 suits, in conjunction with the small staff and inadequate funding of the Civil Rights Division of the Department of Justice, has been suggested as a reason for the Department's laxity. But these factors alone do not explain the almost twenty-five-to-one-ratio of private suits filed under section 706 to Justice Department suits filed under section 707 from the effective date of the law to 1971, particularly since in many of the private suits the courts have found patterns or practices of discrimination. 8 /

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8 / Herbert Hill, "The Equal Employment Opportunity Act of 1964 and 1972: A Critical Analysis of the Legislative History and Administration of the Law," 2 Indus. Rel. L. J. 1, 29 (1977).

The Senate Subcommittee on Labor of the Committee on Labor and Public Welfare praised the Civil Rights Division noting that "Those selected suits which the Division has been able to bring... have contributed significantly to the Federal effort to combat employment discrimination." [9] According to the Subcommittee, a primary reason for the transfer was that the Department of Justice had filed too few Title VII lawsuits.[10]

> Unfortunately, the size of the Division has not kept pace with its vastly increased responsibilities. As a consequence the Division has been highly selective and very limited in the number and the nature of suits which it has filed. It has been unable to pursue Title VII suits with the vigor and intensity needed to reduce the wide-spread prevalence of systemic discrimination. Indeed, for several years it has accorded the lowest priority to employment discrimination cases. [11]

Once it had been determined that EEOC was to receive enforcement authority with regard to private employers, another motive for eliminating the Department of Justice's pattern or practice jurisdiction was to avoid creating unnecessary duplication of functions. The Subcommittee observed that multiple remedies could cause employers undue burden and harassment. The Subcommittee commented that "pattern or practice" jurisdiction in the Department of Justice was justified at a time when the Commission did not have its own enforcement powers.[12] The Employment Section viewed this transfer of authority to EEOC both as a major loss for the Department of Justice and as a major setback to the enforcement of Title VII.[13]

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[9] H.R. Report No. 1746, 92d Cong., 2d Sess. 73 (1972).

[10] Id.

[11] Id.

[12] Id. at 74.

[13] Interview with David L. Rose, Chief, Employment Section, Civil Rights Division, Department of Justice, July 13, 1977.

B. Responsibilities After 1972

Regardless of the merits of the transfer, it is clear that after the 1972 amendments, the Employment Section was left with only limited authority to combat employment discrimination. As of August 1977, it had three basic tools at its disposal:

(1) In enacting the 1972 amendments, Congress extended the protections of Title VII to State and local government employees.[14] The amendments prohibited EEOC from suing such entities and gave the Attorney General the authority to bring suit against State and local governments where EEOC had been unable to conciliate individual charges of discrimination according to the procedures provided for in section 706.[15]

In addition, the Federal Government regards the amendments as providing the Attorney General with the independent authority to initiate suits against State and local governments alleging a pattern or practice of discrimination.[16] However, the statute does not explicitly state that this power rests with the Attorney General, and this authority has been questioned in at least four district courts which have held that the Department lost its authority to file such suits when it lost its authority to initiate "pattern-and-practice" suits in 1974.[17]

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[14] The same amendment also broadened the coverage of Title VII by deleting the original exemptions from Title VII protections of certain employees connected with educational institutions. The amendments extended protection to Federal employees, as well. Coverage was also expanded to employers and labor unions with 15 or more employees or members, 42 U.S.C. § 2000e (b), (e), (f) (Supp. V, 1975), whereas previously only employers and labor unions with 25 or more employers or members were covered.

[15] 42 U.S.C. § 2000e. These procedures require that EEOC investigate complaints and when it finds reasonable cause attempt conciliation before referring them to the Attorney General for litigation. 42 U.S.C. § 2000e-5.

[16] July 13 Rose interview, *supra* note 13.

For example, one court has held:

> The statute /Title VII/ is unequivocal. Since March 24, 1974, the sole federal agency authorized to bring a pattern and practice suit against an employer, either private or public, is the Equal Employment Opportunity Commission. "Effective two years after March 24, 1972, the functions of the Attorney General under this section/707/ shall be transferred to the /Equal Employment Opportunity/ Commission, together with such personnel, property, records and unexpended balances of appropriations...." Title 42, United States Code Section 2000e-6(c).... The "function" of the Attorney General under Section 2000e-6/707/ was to bring pattern and practice suits. Subsection (c) clearly relieves the Attorney General of that authority and vests it in the Commission. [18]

In contrast, the Attorney General argues:

> The 1972 amendments to Title VII extended coverage to State and local governments and, for the first time, gave EEOC authority to enforce the Act through litigation, both in suits based on individual charges and in pattern or practice actions.
>
> In transferring to EEOC the Attorney General's pattern or practice functions under section 707, Congress transferred only that authority which the Attorney General enjoyed at the time the transfer provision was enacted, *i.e.*, the authority to bring pattern or practice suits against private employers. The Report of the Senate Committee on Labor and Public Welfare, issued at a time when the Attorney General had authority only to sue

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[17] United States v. Board of Ed. of Garfield Heights School Dist., 13 F.E.P. Cases 1142 (N.D. Ohio., 1976); United States v. Fresno Unified School Dist., 412 F. Supp. 392 (E.D. Calif., 1976); United States v. Pima County Community College Dist., 409 F. Supp. 1061 (D. Ariz., 1976); United States v. North Carolina, C.A. No. 75-1610 (E.D.N.C. 1977) (three-judge court), *notice of appeal filed* July 13, 1977.

[18] United States v. Pima County Community College Dist., 409 F. Supp. 1061, 1062 (D. Ariz., 1976).

> private employers, stated that the bill transferred the "present section 707 functions from the Attorney General to the Commission." Other committee statements and remarks made on the floor of Congress indicate that this was the intention of Congress in transferring the Attorney General's authority to EEOC.[19]

Nonetheless, unless the district court decisions are reversed on appeal or Congress enacts legislation to clarify its language in the 1972 amendments, the Department of Justice may be left without authority to conduct investigations and initiate pattern and practice lawsuits against public sector employers without a referral from EEOC. The Civil Rights Division has drafted a legislative proposal to overcome the possible defect in the 1972 amendments. However, the Employment Section anticipates that the existence of the President's Reorganization Project, which will make recommendations for reorganizing Federal civil rights responsibilities, will preclude any such legislation from being considered by Congress in the near future.[20]

(2) In a variety of circumstances, the Attorney General can also bring suits against recipients of Federal assistance alleging discrimination on the basis of race or national origin in employment practices. For example, under Title VI of the Civil Rights Act of 1964[21] the Attorney General can commence litigation to enforce nondiscrimination in employment in federally

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19/ Brief for United States at 4-5, United States v. North Carolina, No. 75-1614 (4th Cir. 1977).

20/ Interview with David L. Rose, Chief, Employment Section, Civil Rights Division, Department of Justice, July 29, 1977.

21/ 42 U.S.C. § 2000d-1 *et seq*.

assisted programs,[22] if a) the agency providing funding for the program refers the matter to the Department of Justice for litigation and b) either a primary objective of the Federal assistance is to provide employment[23] or nondiscrimination in employment is essential for nondiscriminatory provision of services.[24]

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[22] Judicial enforcement by the Attorney General is not expressly provided for under Title VI, which states that compliance can be secured either through administrative fund termination proceedings or "by any other means authorized by law." 42 U.S.C. § 2000d-1 (1970). However, the phrase "other means" has been construed to include an agency referral to the Attorney General for the initiation of litigation. See Attorney General's "Guidelines for the Enforcement of Title VI, Civil Rights Act of 1964." 28 C.F.R. § 50.3.

[23] 42 U.S.C. § 2000d-3.

[24] See, for example, the regulation of the Department of Health, Education, and Welfare, 45 C.F.R. § 80.3(c)(3).

In addition, the Omnibus Crime Control and Safe Streets Act of 1968 as amended prohibits discrimination on the grounds of race, color, and national origin in the expenditure of LEAA funds for reducing crime and improving criminal justice.[25] In the event of noncompliance by a recipient, the act authorizes the Attorney General to exercise the powers and functions pursuant to Title VI of the Civil Rights Act of 1964. The act also authorizes the Attorney General to bring a civil action in any appropriate district court, for "such relief as may be appropriate, including injunctive relief," whenever the Attorney General "has reason to believe that a State government or unit of local government is engaged in a pattern or practice" in violation of the act.[26]

Similarly, the Attorney General has been granted power to combat employment discrimination under the State and Local Fiscal Assistance Act of 1972 as amended by the State and Local Fiscal Assistance Amendments of 1976.[27] The amendments prohibit State and local governments receiving funds under the act[28] from discriminating on the basis of race, color, national origin, or sex in the expenditure of those funds.[29] Prohibited discrimination includes not only discrimination in the operation of programs funded under the act but also discrimination in employment practices of those programs.[30] The amended act authorizes the Attorney General to file suits against any State or local government which violates the act's prohibition against discrimination. The amendments state:

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[25] Omnibus Crime Control and Safe Streets Act of 1968 as amended. 42 U.S.C. § 3701 *et seq*.

[26] *Id*.

[27] 31 U.S.C. § 1221 *et seq*.

[28] The act provides funds for State and local governments, with few restrictions on the expenditure of these funds.

[29] Section 122 of the amended act states:

> No person in the United States shall, on the ground of race, color, national origin, or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity of a state government or unit of local government, which government or unit receives funds [under the act]....

> Whenever the Attorney General has reason to believe that a State government or a unit of local government has engaged or is engaging in a pattern or practice in violation of the provisions of this section /prohibiting discrimination in programs or activities funded with general revenue sharing funds/, the Attorney General may bring a civil action in an appropriate United States district court. Such court may grant as relief any temporary restraining order, preliminary or permanent injunction, or other order, as necessary or appropriate to insure the full enjoyment of the rights described in this section, including the suspension, termination, or repayment of /general revenue sharing/ funds ...or placing any further payments...in escrow pending the outcome of the litigation.[31]

(3) Under Executive Order 11246, the Attorney General is empowered to bring suit, upon referral by the Department of Labor (DOL), against

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[30] The coverage of employment discrimination is discussed in U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort--1974, Vol.IV, To Provide Fiscal Assistance 273-88 (1975).

[31] 31 U.S.C. § 1221.

Federal contractors who fail to comply with Executive Order No. 11246.[32/] In addition, in January 1977 DOL issued regulations which delegate to the Department of Justice the authority to initiate, without a referral from the Department of Labor or a compliance agency, investigations of Federal contractors and to initiate civil actions against contractors who are found to be in noncompliance with the Executive order. Prior to filing suit, the Attorney General must attempt to secure compliance and offer the contractor an opportunity to conciliate. The regulations state:

> ...the Attorney General may, subject to approval by the Director, initiate independent investigations of contractors which he/she has reason to believe may be in violation of the Order or the rules and regulations issued pursuant thereto. If, upon completion of such an investigation, the Attorney General determines that the contractor has in fact violated the Order or the rules and regulations issued thereunder, he shall make reasonable efforts to secure compliance with the contract provisions of the Order. He may do so by providing the contractor and any other respondent with reasonable notice of the Department's findings, its intent to file suit, and the actions that the Attorney General believes are necessary to obtain compliance with the contract provisions of the Order without contested litigation, and by offering the contractor and any other respondent

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[32/] Executive Order No. 11246, as amended, prohibits discrimination by Federal contractors in employment because of race, creed, color, sex, or national origin. It requires Federal contractors to take affirmative action to ensure that equal employment opportunity principles are followed in personnel practices at all company facilities. The Executive order states that the Department of Labor may:

> Recommend to the Department of Justice that, in cases in which there is substantial or material violation or the threat of substantial or material violation of the contractual provisions set forth in Section 202 of this Order, appropriate proceedings be brought to enforce those provisions, including the enjoining, within the limitations of applicable law, of organizations, individuals, or groups who prevent directly or indirectly, or seek to prevent directly or indirectly, compliance with the provisions of this Order. Exec. Order No. 11246, Sec. 209(a)(2), 3 C.F.R. 1964-1965 Comp., pp. 339, 340, as amended by Exec. Order No. 11478.

> a reasonable opportunity for conference and conciliation in an effort to obtain such compliance without contested litigation. If these efforts are unsuccessful, the Attorney General may, upon approval by the Director, bring a civil action in the appropriate district court of the United States requesting a temporary restraining order, preliminary or permanent injunction, and an order for such additional equitable relief, including back pay, deemed necessary or appropriate to ensure the full enjoyment of the rights secured by the Order, or any of the above. [33]

These new regulations thus permit the Employment Section potentially to file pattern and practice lawsuits against a large group of private employers--those who hold Federal contracts. These regulations effectively give the Employment Section back much of the authority it lost under the 1972 amendments to Title VII [34] and create an additional authority to file pattern and practice suits against private employers which is concurrent with that held by EEOC under Title VII.

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[33] 42 *Fed*. *Reg*. 3461 (Jan. 18, 1977), to be codified at 41 C.F.R. § 60-1.26(f).

[34] More than one-third of all private employees are employed by Federal contractors covered by Executive Order No. 11246 as amended. See DOL, Office of Federal Contract Compliance Programs, National Program Strategy for FY 1977, Mar. 15, 1977.

II. Organization and Staffing

The Employment Section is a unit of the Civil Rights Division of the Department of Justice.[35] The organization of the Division is shown in Exhibit 5-1. As of late July 1977, the Section consisted of 42 employees: a Chief and 2 Deputies, all of whom were attorneys; 1 senior trial attorney,[36] 9 trial attorneys, and 11 attorneys; 7 paralegal specialists;[37] and 11 clerical staff members. In addition, as a result of recent departures, there were vacancies for one attorney and one paralegal specialist. The fiscal year 1978 budget, which is $1,253,000,[38] will provide for

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[35] The Section Chief commented:

> In addition, the existence of the Employment Section is made possible by the structure of the Justice Department and the Civil Rights Division in particular. The Department's chief role is litigation. The Department is organized in a way which permits and encourages the growth of effective litigation units, such as the Employment Section. Letter from David L. Rose, Chief, Employment Section, Civil Rights Division, Department of Justice, to Cynthia N. Graae, Director, Office of Federal Civil Rights Evaluation, U.S. Commission on Civil Rights, Sept. 27, 1977 /hereinafter referred to as Rose letter/.

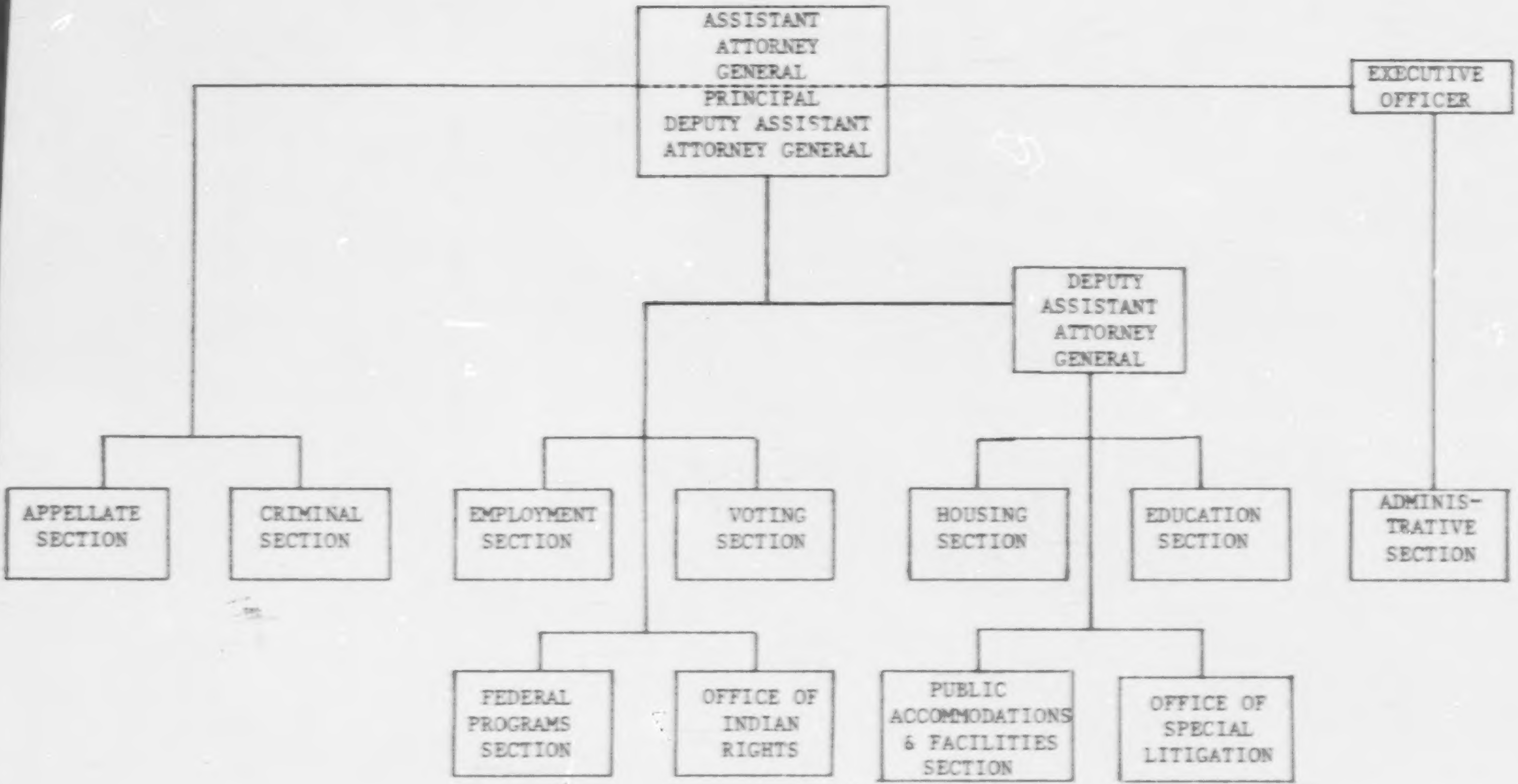
[36] The senior trial attorney, a GS-15, is responsible not only for litigation, but also for reviewing EEOC referrals to determine if they should be pursued and for recruitment at minority law schools.

[37] Telephone interview with Vivian Toler, Lead Paralegal Specialist, Employment Section, Civil Rights Division, Department of Justice, July 27, 1977. Until mid-1977, these paralegal specialists were referred to as research analysts. Three of the paralegal specialists were former secretaries in an upward mobility program. Another has a master's degree. Of the paralegal specialists, one is part-time and one is an unpaid summer intern.

[38] Memorandum from David L. Rose, Chief, Employment Section, Civil Rights Division, Department of Justice, to Cynthia Graae, Director, Office of Federal Civil Rights Evaluation, U.S. Commission on Civil Rights," Operations of Civil Rights Division -- Employment Section," July 26, 1977.

EXHIBIT 5-1

Civil Rights Division Organization Chart
September 1, 1977


ASSISTANT ATTORNEY GENERAL
PRINCIPAL DEPUTY ASSISTANT ATTORNEY GENERAL
EXECUTIVE OFFICER
DEPUTY ASSISTANT ATTORNEY GENERAL
APPELLATE SECTION
CRIMINAL SECTION
EMPLOYMENT SECTION
VOTING SECTION
HOUSING SECTION
EDUCATION SECTION
ADMINISTRATIVE SECTION
FEDERAL PROGRAMS SECTION
OFFICE OF INDIAN RIGHTS
PUBLIC ACCOMMODATIONS & FACILITIES SECTION
OFFICE OF SPECIAL LITIGATION

four additional positions as of October 1, 1977, two for attorneys, one for a paralegal specialist, and one for a clerical staff member.[39]

There are no permanent subdivisions within the Section. Rather, the Section is organized to accommodate the caseload. On each case, there is a lead attorney who acts as the supervisor. While, generally, it is the senior attorneys or senior trial attorney who are the lead attorneys, the Chief or Deputies fill this role when they possess unique expertise for the case.[40] Thus, for example, the Chief was the lead attorney in Albemarle Paper Co. v. Moody;[41] one Deputy was the lawyer in a nationwide steel case, United States v. Allegheny Ludlum;[42] and the other Deputy was the lead lawyer in a nationwide trucking suit, In re Trucking Industry Employment Practices Litigation.[43]

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[39] Rose letter, *supra* note 35.

Reporting to the lead attorney on each case are 2 to 5 other attorneys and 1 to 3 paralegal specialists,[44] depending on the magnitude of the case. The responsibility for supervising lead attorneys is divided among the two Deputy Chiefs and the Section Chief, who together oversee all of the Section's caseload. At any time, a lead attorney may report to the Chief and both Deputies, for three different cases.[45]

The Department of Justice provides two types of training for all new employees in the Section, even though the number of new attorneys is small. The first, conducted by the Civil Rights Division, is a 2-week lecture series held each November for new attorneys in the Federal Programs,

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[40] The Chief or his Deputies are seldom the lead attorneys in cases first going to trial. More frequently they are the lead attorneys in amicus curiae cases or appellate work. It usually takes 3 to 5 years for a new attorney in the Section to become a lead attorney, unless the attorney has had prior experience in private practice. Interview with William Fenton, Deputy Chief, Employment Section, Civil Rights Division, Department of Justice, Aug. 4, 1977.

[41] 422 U.S. 405 (1975).

[42] 517 F.2d 826 (5th Cir., 1975), cert. denied, 425 U.S. 944 (1976).

[43] 384 F. Supp. 614 (Judicial Panel on Multidistrict Litigation, 1974).

[44] The paralegal specialists on each case are responsible for preparing statistics and other technical information and for conducting some interviews. With regard to cases which go to trial, they prepare exhibits and present testimony in court on the findings of their research. The average grade level of the paralegal staff is a GS-11.

[45] Interview with Robert Moore, Deputy Chief, Employment Section, Civil Rights Division, Department of Justice, Aug. 5, 1977.

Education, and Employment Sections. It provides instruction on Department of Justice rules and regulations, discovery procedures, locating witnesses, investigation techniques, and litigation. The lectures are given by Section Chiefs, their Deputies, and lead attorneys. The second type of training is conducted on-the-job by lead attorneys in the Employment Section.[46]

The high quality of work done by the Section[47] can at least in part be attributed to the dedication and skill of the staff,[48] including the Chief, who actively participates in the substantive work of the Section. In addition to occasionally serving as a lead attorney in a case, he closely reviews the efforts of the staff on all cases. Although the Chief has stated that he cannot precisely calculate how he allocated his time

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46/ On-the-job training in trial work has been more comprehensive for staff who have been with the Section prior to the 1972 amendments to Title VII. Since there have proportionately been fewer new cases which have gone to trial since that time, many new attorneys have little trial experience. Fenton interview, supra note 40.

47/ The quality of the work of this section is discussed in Section III, infra.

48/ The Section Chief stated:

> The Section's work is done largely by individual lawyers whose expertise compliments the high degree of responsibility assigned to them. The fact that we have been able to attract and retain a number of exceptionally able lawyers reflects the very substantial responsibility given to them. Not only do they represent the United States in courts, frequently with several competitive other parties; but the nature of equal employment opportunity enforcement requires their frequent and tactful contact with other portions of the Government. Rose letter, supra note 35.

during the past year, he estimates that possibly as much as half his time was spent reviewing the work of the Section.[49]

The Chief also serves as the Department of Justice's staff liaison with other Federal agencies on matters of equal employment opportunity.[50] For example, he has served as the Department's staff representative to the Equal Employment Opportunity Coordinating Council. He has recently worked with staff from the Equal Employment Opportunity Commission on possible revisions in employee selection guidelines.

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[49] Interview with David L. Rose, Chief, Employment Section, Civil Rights Division, Department of Justice, July 15, 1977.

[50] Coordination is discussed in more detail in Section IV, infra.

Although the actual amount of time the Chief spends on interagency activities varies from week to week, he estimates that such activities consumed 30 percent of his time over the past year.

Another factor in the staffing of the Section which may contribute to the quality of the Section's work is the fact that there has been a low rate of turnover in the Section. The Section has had the same Chief and Deputy Chief for the entire 8 years of its existence. The average seniority of the attorneys is 6 to 7 years. Three attorneys were hired in 1976, the first new hires in 3 years. The average seniority for the clerical staff is 9 years. As of early August 1977, a new secretary was to be hired, only the second new secretary in 5 years.[51/]

The principal weakness of the Section continues to be its small size.[52/] The number of attorney positions is not sufficient to have a significant impact upon the discriminatory practices of public and private employers.[53/]

[51/] Moore interview, supra note 45. As of July 1977, the average grade level of an attorney in the Section was between GS-13 and 14. The Chief was a GS-17. His two Deputies and the Senior Trial Attorney were all GS-15's. In addition, 9 of the attorneys were GS-14's; 7 were GS-13's; 2 were GS-12's and 2 were GS-11's.

[52/] The fact that prior to 1972 the Department of Justice had created only a small Section to handle DOJ's responsibilities under Title VII was one reason these responsibilities were transferred to the Equal Employment Opportunity Commission. The matter is discussed in the previous section of this chapter.

[53/] In addition to the fact that the Section cannot handle a large number of cases, the Section sometimes lacks the staff it needs to handle all its cases effectively. Thus, for example, junior attorneys sometimes cannot be assigned to a case from beginning to end, but instead may be assigned when the case goes to trial or when it is in the enforcement stage. Similarly, because there are only seven paralegal specialists for 24 attorneys, the attorneys often have to perform work which could be assigned to the paralegal staff.

Employment cases require large amounts of staff resources because of the voluminous records that must be analyzed and the extremely technical, factual, and legal questions involved in determining and proving the existence of discrimination in hiring, testing, seniority lines, and other employment practices. The large number of hours required to prosecute a Title VII action, compounded by the small number of available attorneys, severely limits the number of employment cases that can be brought by the Section.

The Section Chief agrees that its small size is restrictive in that it limits the number of self-initiated cases which it can conduct. He believes, nevertheless, that the Section is adequately staffed to handle the cases referred to it from OFCCP and EEOC. However, the Chief does not want to measurably increase the size of the Section. He believes that under its present structure the Section should not exceed 35 to 40 attorneys to ensure that the high quality work continues.[54]

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[54] July 15 Rose interview, supra note 49.

Clearly, if the Section increased to any sizeable extent, the Chief would not be able to continue his close involvement with all of the work of the Section, a factor which has enabled him thus far to control the quality of its work. However, presumably the quality of the Civil Rights Division's work could be maintained if additional managers of the skill and expertise of the current Employment Section Chief were hired to direct additional units within the Division to focus on employment discrimination. Thus, it would appear that the Department of Justice could have, if it had chosen to, increased the resources it allocated to the elimination of employment discrimination.[55]

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[55] The Section Chief stated:

> The report states that it is my view that the Employment Section of the Civil Rights Division should not exceed 35 to 40 lawyers. I intended to state this limitation based on present organizational structure and responsibilities. I agree with the suggestion in the report that it would be possible substantially to increase the resources devoted to employment discrimination without diminishing the quality of the Civil Rights Division's work in this field of law. In particular, I note that Robert Moore has been with the Division since 1963, and has been Deputy Chief of this Section since it was founded in October 1969. His ability and skills both as a lawyer and manager are outstanding; and he has the ability to assume substantially greater responsibilities than those now assigned. In addition, as your draft notes, there is a depth of experience and expertise among the staff lawyers and support personnel which would provide a solid foundation for expansion of this Division's efforts in the field of employment discrimination. Rose letter, *supra* note 35.

III. Work of the Employment Section

A. Objectives

From the time that the Civil Rights Division became active in equal employment opportunity litigation in 1967, it has had two primary objectives. The first was to develop a body of case law that would enable employers, labor organizations, government agencies, and the general public to understand what Title VII and other Federal equal employment opportunity enactments required. A second objective, which was developed subsequent to the creation of the Employment Section within the Division in 1969, was to provide effective relief to the greatest number of victims of employment discrimination as possible.[56]

B. Procedures in Targeting for Litigation

From 1967 through 1969, the Department of Justice selected the cases it would litigate largely by comparing the representation of minorities[57] in an employer's work force with the representation of minorities in the work force in the employer's geographic location. When disparities were uncovered, the employer was considered by the Department of Justice to be a potential candidate for a Title VII lawsuit.[58]

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[56] Rose memorandum, *supra* note 38 at attachment A, p. 1.

[57] Sex discrimination was not a factor in DOJ target selection during the pre-1972 period. See discussion *infra* this section.

[58] September 6 Rose interview, *supra* note 1. This procedure is described in the Civil Rights Division's 1967 looseleaf guide for attorneys which was developed to help the Division's attorneys evaluate potential Title VII targets across the country. Civil Rights Division, Department of Justice, *Suggested Procedures for Investigation and Development of Title VII Cases Through City Surveys (1967)*.

After October 1969, however, when the CRD divided its responsibilities along functional lines by creating specific units to deal with various types of discrimination,[59/] targeting procedures began to change. Within the newly created Employment Section the emphasis was shifted to targeting industries, so that results and reforms obtained in actions against single representative employers might serve to catalyze changes throughout the industry as a whole.

The targeting was a two-stage process. First, likely industries were selected. These tended to be industries in which either large numbers of minorities worked under segregated conditions, or from which minorities were excluded, notwithstanding their availability in the work force. Of course, the size of the industry as a source of employment was also an important criterion. Second, after an industry was selected, target employers were chosen based on their negative equal employment posture, both in statistical comparison to the industry as a whole, and in terms of specific practices identified as possible Title VII violations.

59/ The Employment, Education, Housing, Criminal, Voting, and Federal Programs Sections were each created as separate units within DOJ on Oct. 6, 1969.

The 1972 amendments to Title VII brought a shift in targeting from private to public employers. In 1972 the Employment Section began to select potential public sector defendants for lawsuits to be filed under Title VII's section 707 public sector "pattern and practice" jurisdiction, which was given to the Department of Justice as a result of the 1972 amendments. Attorneys and paralegals reviewed Bureau of the Census data on Standard Metropolitan Statistical Areas (SMSAs)[60/] with respect to (a) size of the SMSA and (b) ratio of the black, Hispanic origin, Asian American, and Native American populations to the population as a whole. In addition, reports filed by State and local governments with the Equal Employment Opportunity Commission on minority and female employment were also utilized by DOJ once EEOC developed them.[61/] This information was, in order of significance: the impact of the litigation, its potential for making new law, and the provability of the discrimination charges. Cases which involved both race and sex discrimination were viewed as having more impact than race alone.

[60/] An SMSA consists of a county or group of counties containing at least one city with a population of 50,000 or more plus adjacent counties which are economically and socially integrated with the central city. U.S. Department of Commerce, Bureau of the Census, Public Use Samples of Basic Records from the 1970 Census: Description and Technical Documentation 135 (1972).

[61/] According to the Chief of the Employment Section, DOJ actively sought EEOC assistance in obtaining employment data for targeting public employers in 1972. However, data from the EEOC report form for State and local governments (FORM EEO-4) was not available until June 1974. September 6 Rose interview, supra note 1.

Also it was believed that suits against the largest cities would cause other cities to eliminate discriminatory practices voluntarily in order to avoid being sued. As a result, the Section began suing public sector employers. According to the Section Chief, most major U.S. cities where public sector employment discrimination could be proved have been involved in some type of Justice Department litigation. As of July 1977, the Employment Section was beginning to focus its attention on governments in large suburban areas.[62/]

Although most Employment Section actions have been against police and fire departments, also included were suits against public utilities, city and county governments,[63/] and one against an entire State bureaucracy, that of Alabama.[64/] In the public sector DOJ has concentrated its resources on lawsuits against police and fire departments because of the visibility, status, and high pay accorded these civil servants, as well as the extremely low number of minorities and women employed. In addition, a single test is generally used for hiring in these occupations which simplifies the litigation. In contrast, some State departments use a different test for every job category. Finally, litigation could focus on recruitment and hiring, which in DOJ's view are relatively uncomplicated aspects of employment on which to litigate.

62/ July 29 Rose interview, supra note 20.

63/ Countywide suits have been filed against Miami, Florida; Jackson, Mississippi; San Diego, California; Memphis, Tennessee; and Montgomery, Alabama. Rose letter, supra note 35.

64/ Id. United States v. Frazer (M.D. Ala., Civil Action No. 2079-N).

It appears, however, that there is a need for the enforcement of Title VII in other State and local occupations, as well. EEOC data on public employment shows that minorities and women tend to be underrepresented in a variety of positions and occupations. For example, in 1974, 31.2 percent of all women and 24.9 percent of all minorities working for State and local governments were employed by hospitals and sanitoriums, the lowest paid occupational category listed by EEOC.[65/] Although women comprised 35.5 percent of all State and local government employees, they comprised only 3.1 percent of all sanitation and sewage workers, 7.6 percent of all street and highway employees, 11.5 percent of all utilities and transportation personnel, and 19.1 percent of all employees in natural resources, parks, and recreation.

Similarly, although minorities constituted 20.5 percent of all State and local government employees, they comprised only 12.0 percent of employees in financial administration, 12.3 percent of all workers on streets and highways, and 16.1 percent of personnel in natural resources, parks, and recreation.

Moreover, it is clear that even in those fields of State and local employment in which minorities and women are well represented, they do not often occupy the highest paying professional and managerial positions. For example, although women comprised 70.3 percent of all hospital and sanitorium workers, they comprised only 8.3 percent of hospital and sanitorium administrators earning $25,000 or more annually. Minorities comprised 38.1 percent of all sanitation and sewage workers, but only 8.7 percent of all professional and 10.1 percent of all administrators in that field.

[65/] In 1974, the average annual salary of a public employee was $9,146, but the average annual salary of a public hospital or sanitorium worker was only $7,629. EEOC, *Minorities and Women in State and Local Government 1974* (1977). This report, which is the most recent from EEOC on State and local government employees, is the source of all data on minority and female public employment in this section.

Historically, the case selection processes of the Employment Section did not adequately address the issue of sex discrimination. Prior to 1972 only two of the Section's cases alleged discrimination on this basis.[66] The Section Chief regards as warranted, criticism directed at the low priority afforded sex discrimination charges by DOJ before 1972. Moreover, he acknowledges that since 1972 it has only been the public sector litigation that has adequately included sex discrimination as an allegation.[67] The Office of the Assistant Attorney General for Civil Rights has made a program commitment to increase sex discrimination litigation, but this has not yet materialized in the Section's caseload.[68]

C. Results of DOJ Litigation

In the 10 years since DOJ began to actively pursue equal employment enforcement litigation, 168 lawsuits have been brought, 148 of which are characterized by DOJ as "large scale pattern and practice" suits.[69]

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[66] United States v. Libbey-Owens-Ford, 3 EPD /CCH/ ¶ 8052 (N.D. Ohio, 1970), Consent decree 3 EPD /CCH/ ¶ 8122 (N.D. Ohio, 1970), and United States v. Obear-Nester Glass, consent decree entered (E.D. Ill., 1972).

[67] Between 1972 and 1974 DOJ filed lawsuits against only two airlines and one national loan company where sex discrimination charges were included. Consent decrees were entered in each instance. Of 34 lawsuits filed against public sector employers after 1974, 6 alleged sex discrimination alone and 19 alleged sex, race, and national origin discrimination. It has been conceded by DOJ that in the extensive industrywide litigation against trucking companies, the last major private sector "target" of the Section before jurisdiction was transferred to EEOC, sex discrimination could have been alleged but was not. Evidence to substantiate sex discrimination charges was not even sought in the course of the investigation. July 29 Rose interview, *supra* note 20.

[68] *Id.* The commitment was part of the performance goals included for submission to OMB in the Division's budget request for fiscal year 1978.

[69] July 26 Rose memorandum, *supra* note 38, attachment A at 1.

The other 20 were individual or small class action complaints referred from EEOC under section 706 of the Civil Rights Act of 1964 or suits to enforce reporting requirements under section 709 of that act.[70] DOJ reports that 121 of the pattern or practice suits have been successfully resolved either by the entry of decrees following trials and appeals or through consent decrees entered with the courts.[71] None of the pattern or practice suits have been lost on their merits.[72] Twenty-seven pattern and practice cases are still active.

Of the 168 suits filed by the Department of Justice, 148 have been cases of the Employment Section.[73] Exhibit 5-2[74] shows the suits handled by the Section in three time periods: 1966-72, when DOJ had exclusive

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[70] Section 709 requires employers to keep such records and file such reports as EEOC prescribes. 42 U.S.C. § 2000e-8(c) (Supp. V, 1975).

[71] DOJ has achieved 74 consent decrees prior to litigation. In addition, 47 decrees are the result of court action; some of these being court decrees and others, consent decrees obtained after litigation had been initiated. September 6 Rose interview, *supra* note 1.

[72] Four district courts have dismissed DOJ public sector cases under section 707 of Title VII on jurisdictional challenges. See note 17, *supra*.

[73] The remaining 20 have been handled by the Education Section.

[74] This exhibit was compiled by Commission on Civil Rights staff, based on statistical data provided to the Commission by the Employment Section, DOJ, July 1977.

EXHIBIT 5-2

LITIGATION ACTIVITY 1966-1977

	1966 to March 1972	March 1972 to March 1974	March 1974 to July 1977	Total 1966 to 1977
Types of Discrimination Alleged:				
Race Only	62	10	10	82
Race/Nat'l Origin	11	9	0	20
Sex Only	1	2	5	8
Race/Sex Nat'l Origin	1	6	8	15
Race/Sex	1	5	10	16
Religion	0	1	1	2
Failure to Report Under § 709	-	-	5	5
Total	76	33	39	148
Who Was Sued:*				
Private Employer	37	9	-	46
Public Employer	2	13	31	46
Union	47	6	1	54
Utility	2	5	4	11
Trucking Co.	9	5	1	15
Hospital	1	-	1	2

* Note: in some of the cases, there was a combination of defendants, e.g., a private employer and a union.

Title VII litigation authority; 1972-74, when DOJ shared private sector authority to litigate under Title VII with EEOC and gained exclusive public sector litigation authority; and 1974 to July 1977, when DOJ had only public sector authority to sue under Title VII. Exhibit 5-2 indicates the bases on which DOJ alleged employment discrimination and the type of respondents against whom DOJ has litigated.

A number of civil rights organizations are in accord in crediting DOJ with having very successfully accomplished its primary objective of making good equal employment opportunity law.[75/] On such major issues as goals and timetables, employee selection and testing, seniority, and the expansion of the definition of discrimination to include the discriminatory

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75/ Lawyers' Committee for Civil Rights Under Law, Comments on Reorganization of Enforcement of Nondiscrimination in Employment (Aug. 18, 1977). Interview with M. Bellar, attorney, Mexican American Legal Defense and Education Fund, July 22, 1977, and interview with Peter Sherwood, staff attorney, National Association for the Advancement of Colored People Legal Defense and Educational Fund, Inc., July 21, 1977.

impact of facially neutral practices, DOJ's Employment Section has established a positive record.[76] In DOJ's view, "The development of a favorable

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[76] The following is the Section's own account of its accomplishments: When the Civil Rights Division became actively involved in the enforcement of equal employment opportunity law in late 1966 and early 1967, there had been virtually no decisions interpreting the substantive law. The Division obtained the first appellate decisions holding that Federal law not only prohibited overt, purposeful discrimination, but also prohibited facially neutral practices which perpetuated the effects of past discrimination, Local 189, United Papermakers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); United States v. Local 36, Sheet Metal Workers, 416 F.2d 123 (8th Cir. 1969). See also: United States v. Local 53, Asbestos Workers, 407 F.2d 1047 (5th Cir. 1969). These cases laid the conceptual framework for the landmark United States Supreme Court decision in Griggs v. Duke Power Co., 401 U.S. 424 (1971). In Griggs, as in each other major employment case before the United States Supreme Court the Department of Justice participated as *amicus*, and the brief for the Department was drafted initially in and by the Civil Rights Division. The one exception was Washington v. Davis, 426 U.S. 229 (1976) in which the Civil Service Commission was a party defendant and the Government's brief was initially drafted by the Civil Division. For examples of the Civil Rights Division's involvement in cases reaching the Supreme Court, see cases defining sex discrimination: Phillips v. Martin Marietta, 400 U.S. 542 (1971), Cleveland Board of Educ. v. La Fleur, 414 U.S. 632 (1974). Other major precedents in the highly complex but important field of the discriminatory use of tests and other selection procedures have also been decided in cases which were brought by the Civil Rights Division; e.g., United States v. Jacksonville Terminal Co., 451 F.2d 418 (5th Cir. 1971), *cert. denied* 406 U.S. 906 (1972); United States v. Ga. Power Co., 474 F.2d 906 (5th Cir. 1973); United States v. City Chicago, 549 F.24 415 (7th Cir. 1977); Firefighters Inst. v. City of St. Louis, 549 F.2d 506 (8th Cir. 1977); or in a case in which the Department participated and argued orally as *amicus* both before the appellate court sitting en banc and in the United States Supreme Court--Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). (Continued.)

76/ (Continued.)

The law of appropriate remedies has also been developed to a large extent in cases in which the Civil Rights Division has either brought the suit or participated as a party or as amicus. For example, United States v. Local 53, Asbestos Workers, 407 F.2d 1047 (5th Cir. 1969) first established the principle that affirmative steps must be taken to correct the effects on past discriminatory employment practices. Accord:, Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). Similarly, the landmark decisions sustaining the use of numerical goals and timetables as a remedy for past discrimination were either in cases brought by the Civil Rights Division (United States v. Local 86, Ironworkers, 443 F.2d 544 (9th Cir. 1971), cert. denied, 404 U.S. 984 (1971) or in which the Division participated as amicus, Carter v. Gallagher, 452 F.2d 327 (8th Cir. 1972) (en banc), cert denied, 406 U.S. 950 (1972); Morrow v. Crisler, 491 F.2d 1053 (5th Cir. 1974) (en banc), cert. denied, 419 U.S. 895 (1974). The Division has represented the Government in cases sustaining the use of numerical goals and timetables even without a finding of individual discrimination, as a part of the affirmative action obligations imposed under Executive Order No. 11246. Contractors Assoc. of Eastern Pa. v. Sec. of Labor, 442 F.2d 159 (3d Cir. 1971), cert. denied, 404 U.S. 854 (1971). Similarly, the Division played an important role in developing the proposition that back pay and retroactive seniority should normally be awarded to identified victims of unlawful discriminatory practices. Franks v. Bowman Transp. Co., 424 U.S. 747 (1976) (amicus participation in appellate court and United States Supreme Court); Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975); United States v. Ga. Power Co., 474 F.2d 906 (5th Cir. 1973); United States v. NL Industries, 479 F.2d 354 (8th Cir. 1973). July 26 Rose memorandum, supra note 38, Attachment A, 2-4.

Although there is general agreement that the Department of Justice played a role in these cases, in many instances EEOC and the private bar also participated. There is dispute as to whose role was most important in some of these cases. See memorandum from Abner W. Sibal, General Counsel, EEOC, to Steven Sacks, U.S. Commission on Civil Rights, "Impact of the EEOC on the Development of Title VII law," undated.

body of substantive law in...cases [handled] by the Employment Section] was due, in part, to care in the selection of cases and the full development of a factual record."[77]

Whether or not the Employment Section has, however, even within its limited resources, been active enough in terms of the quantity of its litigation is at least debatable. The institution of 148 suits in 10 years (76 for the first 5 years and 72 for the next 5 years) is an average of about 15 cases per year. Given the Section's size, ranging between 24 and 35 lawyers, this indicates an average of almost two person years per case.[78] Although it must be conceded that many of DOJ's cases were complex and required extensive investigation and pretrial discovery,[79] there is some opinion that at times DOJ is too cautious and conservative; it has been alleged that it often over-prepares its cases and thus reduces its capacity to involve itself in more litigation.[80]

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[77] July 26 Rose memorandum, supra note 38, attachment A at 3.

[78] See, for example, quotation from Hill article, supra note 8.

[79] It is estimated by the Chief of the Employment Section that most cases require between 1 and 2 years of activity from initial investigation through final resolution. September 6 Rose interview, supra note 1.

[80] This view was expressed by both the General Counsel to the National Commission on the Observance of International Women's Year, telephone interview with Linda Dorian, General Counsel, National Commission on the Observance of International Women's Year, July 19, 1977, and by the Counsel to the Mexican American Legal Defense Fund (Bellar interview, supra note 75).

Another serious criticism of the Employment Section's results has been that the unit has overemphasized prospective relief in its settlement negotiations and litigation, to the detriment of past victims entitled to retroactive relief. The Lawyers' Committee for Civil Rights Under Law, although generally praising DOJ's efforts in the equal employment opportunity field, has stated, "The one ground on which civil rights attorneys active in the area of employment discrimination litigation have criticized the Department is that it has historically placed too little emphasis on back pay."[81] This view has been reiterated by a number of individuals and groups active in the equal employment opportunity area,[82] and there is evidence that DOJ has responded to this criticism by devoting considerably more resources to back pay proceedings.[83] It should be noted, however, that DOJ may be justified in forgoing full retroactive relief if such action significantly facilitates the prompt attainment of prospective relief.[84] Arguably, ensuring equal employment opportunity for all current and prospective employees in the future is of greater benefit to the general public welfare than is retroactive relief for individuals.

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[81] Comments on Reorganization of Enforcement of Nondiscrimination in Employment, supra note 75, at 45.

[82] Telephone interviews with Ruth Wyand, former General Counsel to the International Union of Electrical, Radio, and Machine Workers, July 26, 1977, and Kathleen Peratis, A.C.L.U. Women's Rights Project, July 18, 1977. See also, Bellar interview, supra note 75.

[83] July 29 Rose interview, supra note 20.

[84] Employers are generally far more willing to consent to reforming and improving their minority and female hiring and promotion practices where such agreement is not accompanied by expensive back pay for an entire class. September 6 Rose interview, supra note 1.

The Employment Section believes that its recent litigation efforts have produced substantial remedies in terms of retroactive relief. In particular, DOJ asserts that its litigation efforts produced $41.5 million in back pay.[85] DOJ also notes that when it cannot negotiate early consent decrees with employers and is forced to engage in extensive litigation efforts, it does in fact ask for greater relief than it would have accepted in early settlement.[86] In a case against Leeway Motor Freight, DOJ originally sought a settlement involving prospective relief and approximately $150,000 in retroactive relief. This offer was rejected by the respondent. During the course of the trial, DOJ raised the minimum amount of retroactive relief it would accept to $350,000. This too was rejected by the respondent. After DOJ spent 8 to 10 lawyer years fully litigating the case, the district court entered a judgment for back pay damages in excess of $1.8 million.[87]

The Department of Justice has also been criticized for failing to adequately monitor the court orders and consent decrees which it does obtain. A number of civil rights organizations have indicated that DOJ's monitoring efforts are inconsistent and inadequate.[88] The Chief of the Employment Section confirms that, with one possible exception, lack of monitoring is sometimes a problem given the small size of the unit.[89] Attorneys have generally been assigned to monitor compliance with those cases which they originally litigated, but limited time and the priority given to current caseload have made consistent monitoring very difficult to maintain. This problem is compounded when an attorney leaves the Section and the case is reassigned.[90] It appears, however, that monitoring has improved somewhat since 1974. As of March 24, 1974, after the transfer to EEOC of most of the Section's private sector cases, DOJ had 21 consent decrees or court orders outstanding. By September 1977, this number had grown to 44. As a result of monitoring, which uncovered noncompliance with consent decrees, DOJ has moved for supplemental relief in seven of these cases since 1974.[91]

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[85] See July 26 Rose memorandum, supra note 38, attachment A, at 1, 5. This excludes $17 million obtained in a consent decree with the American Telephone and Telegraph Company, which was initiated by the Equal Employment Opportunity Commission. However, it appears that $31 million of this amount derives from the decree in United States v. Allegheny-Ludlum, 517 F.2d 826 (5th Cir. 1975) cert. denied, 425 U.S. 944 (1976). This is a case for which EEOC claims considerable credit. Memorandum from Peter C. Robertson, Director, Office of Federal Liaison, to Alfred Blumrosen, Special Assistant to the Chair, EEOC, July 22, 1977.

[86] July 29 Rose interview, supra note 20.

[87] Final judgment in United States and EEOC v. Leeway Motor Freight et al. C.A. No. 72-445 (W.D. Okla. Oct. 11, 1977).

[88] This view has been expressed for example, by representatives from both the NAACP Legal Defense and Educational Fund (Sherwood interview, supra note 75) and the Mexican American Legal Defense and Education Fund (Bellar interview, supra note 75).

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[89] July 15 Rose interview, supra note 49. The possible exception was United States v. Allegheny-Ludlum, 517 F.2d 826 (5th Cir., 1975), cert denied, 425 U.S. 944 (1976).

[90] Interview with Robert Moore, Deputy Chief, Employment Section, Civil Rights Division, Department of Justice, Sept. 1, 1977.

[91] Telephone interview with David Rose, Chief, Employment Section, Civil Rights Division, Department of Justice, Sept. 8, 1977.

IV. Coordination[92]

A. EEOC

As part of its targeting procedures the Employment Section regularly mailed notices to EEOC informing EEOC of its interest in possibly litigating against an employer. These notices enabled EEOC either to request that the Department of Justice refrain from proceeding where it was actively pursuing the employer in question,[93] or on the other hand, to supply DOJ with additional information in support of its potential complaint, based on charges filed and/or investigations conducted by EEOC. Both the Employment Section Chief and Assistant EEOC General Counsel, who is that agency's principal contact with DOJ for litigation matters, are in agreement that this process has generally worked smoothly.[94]

It also appears that where the agencies have cooperated on pattern and practice litigation, excellent results have been obtained. For example, the two agencies have cooperated in obtaining a consent decree with the American Telephone and Telegraph Company (AT&T). Another area where the

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[92] In addition to the coordination discussed infra, the Department of Justice has been the lead agency on the Equal Employment Opportunity Coordinating Council discussed in Chapter 6, infra.

[93] The Chief of the Employment Section has indicated that Justice did in fact refrain from litigating in the few instances where EEOC or DOL so requested. September 6 Rose interview, supra note 1.

[94] Interview with William Robinson, Assistant General Counsel, EEOC, Aug. 12, 197

Employment Section and EEOC have successfully coordinated is in the bringing of suits by DOJ to enforce EEOC reporting requirements against recalcitrant State and local governments. Five such suits have been brought by the Employment Section since 1972.

In 1974, however, after EEOC obtained exclusive jurisdiction to bring section 707 private sector pattern and practice suits, a group of DOJ Employment Section attorneys was detailed to EEOC for 90 days in an effort to assist the newly expanded EEOC legal staff in adjusting to its new systemic litigation authority. This detail is universally agreed upon as having been a failure.[95] The Department of Justice attorneys were housed in a building completely separate from EEOC legal staff, and communication between members of the DOJ detail and EEOC lawyers was minimal. It appears that the failure of the effort to coordinate was at least partly the result of a particularly negative climate in both agencies toward one another at that time.[96]

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[95] Interviews with former DOJ Employment Section attorneys Dennis Gordon (July 28, 1977) and Cynthia Atwood (July 20, 1977) who served on this detail, and Robinson interview, supra note 94.

[96] Id. Clarence Mitchell, Director, Washington Bureau of the National Association for the Advancement of Colored People, in his testimony before the Senate Committee on the nomination of John Powell as Chairman of EEOC, stated:

> I am sorry to say that the Justice Department is still resisting transfer as required by the statute and one of the primary reasons for the resistance is the real or supposed intention of some of the lawyers to refuse to go to EEOC if transferred. This is incredible and wholly unacceptable to those who have labored through the years for the creation of the Equal Employment Opportunity Commission....
>
> At this time /1973/ the employees of the Justice Department are engaged in an extensive lobbying activity with private organizations to urge that the pattern or practice function which is due to transfer to the EEOC in March of 1974, be postponed. Hearings on the nomination of John Powell as a member of the Equal Employment Opportunity Commission Before the Senate Comm. on Labor and the Public Welfare, 93d Cong., 1st Sess. at 30 (1973).

The Employment Section has, since its creation, strongly preferred to work on pattern and practice cases rather than on individual referrals from EEOC. Prior to 1972, when DOJ had independent authority to initiate private sector pattern suits under Title VII, the unit rarely intervened in privately initiated section 706 litigation or litigated cases referred from EEOC. Likewise, since 1972 DOJ has continued to do most of its own section 707 investigating and targeting in the public sector, rather than proceeding on individual charges referred from EEOC under section 706.[97]

It is possible that the failure of the Employment Section to do more section 706 referral litigation is a result of its desire to concentrate on large impact pattern and practice cases. The limited resources of the Section demand that priorities be established, and clearly DOJ does not have the capability to litigate more than a handful of individual section 706 referrals and still maintain its systemic litigation program.[98] However, the Department of Justice has indicated that the poor quality of EEOC files has been a factor in DOJ disposition of EEOC referrals. It has been estimated that as few as one of every 100 EEOC referrals is acceptable to the Employment Section for litigation.[99] The Employment Section has found that the files referred from EEOC District Offices are, in general, either inadequately investigated, outdated, or both. This situation appears to have been the same both on private sector referrals before 1972 and on public sector complaints since 1972 referred under section 706, where DOJ continues to have exclusive litigation authority within the Government. EEOC's investigative files have, in fact, been held to be lacking by EEOC's own legal staff in the majority of cases, and therefore the Department of Justice cannot be largely blamed for its own failure to litigate more section 706 public sector cases referred to it.[100]

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[97] DOJ has filed 14 lawsuits against public sector employers based on EEOC referrals. Rose letter, supra note 35. The Section "reviewed approximately 465 § 706 referrals from EEOC in fiscal year 1977 [since Oct. 1, 1976] and has issued right to sue letters with respect to most of them." July 26 Rose memorandum, supra note 38.

[98] Robinson interview, supra note 94.

[99] Interview with Squire Padgett, Deputy Chief, Employment Section, Civil Rights Division, Department of Justice, July 18, 1977.

The Employment Section, however, appears to have done less than it might have in attempting to help EEOC improve its section 706 case referrals. In mid-fiscal year 1976, the Chief of the Employment Section toured a number of EEOC District Offices[101] in an effort to convey to staff in those offices the investigative standards which DOJ considered as necessary for DOJ to be able to litigate. The Chief later stated, "The specific procedure which we had suggested for referrals has only been used successfully by one district office to date. On the whole, my view of the trips was that they were disappointing."[102]

100/ See discussion in Chapter 4, Equal Employment Opportunity Commission at 16.

101/ This trip was a joint project of DOJ's Employment Section Chief, David Rose, and EEOC's Director of Federal Liaison, Peter C. Robertson.

102/ Rose letter, *supra* note 35.

On the whole, it would appear that DOJ does not give adequate feedback to EEOC on the reasons for rejecting referrals. Although DOJ has a written form which it uses to evaluate each EEOC public sector section 706 referral, that form is not sent back to EEOC.[103] DOJ indicates that, periodically, all section 706 rejections are reviewed by a Deputy Section Chief[104] and states further that a staff attorney regularly informs EEOC district offices of recurrent deficiences.[105] Nevertheless, it would appear that more detailed communication is needed between the Employment Section and EEOC.

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[103] September 1 Moore interview, supra note 90. The Section Chief explained:

> The reason that we do not state the basis for rejecting referrals to EEOC is to protect the charging parties. In many cases the basis for our rejecting a case does not reflect on the merits of the charging party's claim yet if cases where the file is inadequate and if we so state in writing, the chances are that respondent employer would have access to our letter and would be able to use it against the charging party in court. For that reason we have decided not to set out reasons in our returns to EEOC. We have had numerous discussions with EEOC officials setting forth reasons for rejecting files or groups of files; and have always been available to discuss individual cases. Rose letter, supra note 35.

It would appear, however, that the Department of Justice could devise a system whereby it could provide the necessary feedback to EEOC and at the same time make clear where inadequacies in the file are not reflective of the merits of the charging party's claim.

[104] Id.

[105] Id.

B. Department of Labor

Executive Order No. 11246 empowers the Employment Section to litigate contract compliance violations, when these violations are referred from contract compliance agencies to DOJ through the Department of Labor's Office of Federal Contract Compliance Programs; however, DOL has filed only nine such suits since 1969.[106] Since the inception of the Executive order it is estimated that no more than 10 to 15 cases have been referred to DOJ for litigation.[107] As with the cases referred from EEOC, DOJ finds that DOL's referrals often need additional investigation before litigation is possible.[108] The Associate Solicitor for Civil Rights and Labor Relations, who determines whether matters under the Executive order should be referred to DOJ,[109] stated that his office has had and continues to have a good working relationship with the Employment Division. "Given the resources" of the Employment Division, the Associate Solicitor believes that DOL referrals are handled "expeditiously."[110]

106/ July 15 Rose interview, supra note 49.

107/ Telephone interview with Louis Ferrand, Counsel for Civil Rights, Office of the Solicitor, Department of Labor, Sept., 2, 1977. Confirmed in September 6 Rose interview, supra note 1. Neither DOL or DOJ could provide an exact count of the number of referrals to DOJ from Labor since the Executive order became effective in 1965.

108/ July 13 Rose interview, supra note 13.

109/ The Solicitor's Office may determine to refer an Executive order matter to DOJ if novel issues of law exist or the nature of the contractor is such that termination or debarment from a contract is inappropriate.

110/ Interview with James Henry, Associate Solicitor for Civil Rights and Labor Relations, DOL, July 20, 1977.

The other principal contact between DOJ and DOL has been initiated by DOJ, when it has targeted an employer for possible litigation. DOJ regularly informs DOL of the employers DOJ may litigate against so that DOL may determine if these section 707 targets are also Federal contractors under Executive Order No. 11246. In recognition of the need for more extensive consideration under the new DOL regulations,[111] DOL is in the process of developing a written agreement between it and DOJ.[112]

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[111] These regulations are discussed in Section I, supra.

[112] Telephone interview with A. Diane Graham, Associate Director, Office of Federal Contract Compliance Programs, DOL, Sept. 9, 1977.

C. Department of the Treasury

As of July 1977, the Employment Section was just beginning to receive referrals from the Office of Revenue Sharing (ORS) of the Department of the Treasury. As with referrals from other Federal agencies, those few complaints received so far from ORS generally appeared not to have been adequately investigated to meet DOJ's litigation standards. DOJ has signed an agreement with the Office of Revenue Sharing "to avoid inconsistency and duplication of effort, in implementing their concurrent responsibilities...." In particular, the two agencies agreed:

- to exchange complaints which allege violations of the State and Local Fiscal Assistance Act of 1972 as amended.
- to notify each other of scheduled compliance reviews.
- to provide each other access to their respective files and records.
- to inform each other of proposed judicial or administrative action under the State and Local Fiscal Assistance Act.
- that where feasible ORS will conduct financial audits at the request of DOJ.
- that existing DOJ Title VII actions against public employers shall be amended, as appropriate, to include an allegation of a violation of the State and Local Fiscal Assistance Act of 1972 as amended. 113/

In addition, both agencies have agreed not to exercise jurisdiction over a case in which the other agency is already involved.

113/ Memorandum of Understanding Between the Office of Revenue Sharing, Department of the Treasury, and Civil Rights Division, Department of Justice, Regarding Coordination in the Enforcement of the Nondiscrimination Provision of Section 122 of the State and Local Fiscal Assistance Act of 1972, Sept. 25, 1975.

In its public sector litigation, the Employment Section alleges revenue sharing violations in addition to Title VII violations wherever possible, as part of its effort to establish the broadest jurisdictional bases for its lawsuits.[114] A major DOJ lawsuit against the Chicago Police Department included allegations of violations of both Title VII and the State and Local Fiscal Assistance Act. The lawsuit originated as a referral from the Law Enforcement Assistance Administration to the Employment Section. Subsequent to the filing of the complaint, DOJ attorneys began to work closely with ORS attorneys in order to broaden the impact of the lawsuit through multi-agency participation and cooperation.[115]

D. Law Enforcement Assistance Administration (LEAA)

LEAA is responsible for administration of the Crime Control Act of 1976, which amends the Omnibus Crime Control and Safe Streets Act of 1968,[116] by requiring LEAA to cut off recipients' funds within 45 days of initiation of litigation by the Attorney General. Pursuant to this amendment, LEAA has developed a draft memorandum of understanding with the Civil Rights Division (CRD) which outlines instances in which LEAA will request the Civil Rights Division to sue. The draft memorandum makes clear that in the majority of cases, LEAA will utilize the administrative process rather than issuing such a request to the CRD, but gives as examples of litigable cases: novel issues of law; lack of "significant" LEAA funding; and prior investigation by the CRD. The memorandum also calls for the sharing of information obtained in compliance investigations and priorities for the allocation of cases between the two organizations.

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[114] Only one suit to date filed by DOJ is exclusively based on a revenue sharing violation, specifically alleging racial discrimination. United States v. Boston Public Works Dept. (D. Mass., filed Nov. 26, 1976).

[115] United States v. Chicago Police Department (N.D. Ill., filed Aug. 14, 1973; order denying revenue sharing funds Dec. 18, 1974; government program for compliance and release of funds approved Mar. 31, 1976: order entered on program for release of funds May 27, 1976). Padgett interview, *supra* note 99.

[116] 42 U.S.C. § 3711-3781.

The Employment Section has filed, on behalf of the Attorney General, several cases received from LEAA. These included the major cases against the police departments of Philadelphia and Chicago. LEAA has referred only one case since the amendment. That case involves the Los Angeles Police Department and was referred to the Civil Rights Division in early Spring 1977.[117]

E. Internal Coordination

The Employment Section is also engaged in coordination with other sections of the Civil Rights Division which have equal employment opportunity responsibilities and with the Department's Civil Division. Within [illegible] Civil Rights Division, the Federal Programs Section generally handles enforcement litigation under Title VI of the Civil Rights Act of 1964[118] against recipients of Federal assistance which may include employment discrimination allegations. The Education Section of the Division handles employment discrimination litigation involving public educational institutions, including allegations of employment discrimination under Title VII and Title IX of the Education Amendments of 1972.[119] It may also litigate against private educational institutions which are Federal contractors, pursuant to Executive Order 11246.[120] The Appellate Section of the Division may become involved in employment discrimination cases in Federal Courts of Appeals and the Supreme Court. Normally, with respect to the cases of the Employment Section, the Appellate Section handles appeals work if the case was lost in district court, while the Employment Section will handle appeals work if it originally won the case at the district court level.

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[117] Telephone interview with David Tevelin, Attorney, Office of General Counsel, LEAA, Department of Justice, Sept. 9, 1977.

[118] 42 U.S.C. § 2000d (Supp. V, 1975).

[119] 20 U.S.C. § 1681-1686.

Because of the Employment Section's expertise in the employment field, other sections of the Civil Rights Division confer with the Employment Section Chief when employment issues arise in cases falling within their area of responsibility.[121] A number of cases involving employment issues recently prepared for litigation by the Federal Programs Section were reviewed by the Employment Section Chief.[122] Similar contact, as necessitated by individual cases, is maintained with the Education Section.

Perhaps the most critical area for internal DOJ coordination is that between the Employment Section of the Civil Rights Division and the Civil Division. The latter unit defends Federal agencies charged under Title VII with violations of Federal employee rights. Over 3.000 such cases have come to the Civil Division since 1972.[123] That Division has in the past taken a number of positions on equal employment issues which directly contradict those taken by the Employment Section.[124/]

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[120] 3 C.F.R. 1964-1965 Comp., pp. 339, 340, as amended by Exec. Order No. 11478.

[121] September 6 Rose interview, *supra* note 1.

[122] *Id.*

[123] *Id.*

In an effort to iron out the outstanding differences between these two Divisions of DOJ, a number of meetings were held in late spring and early summer 1977 between the Assistant Attorney General, Civil Rights Division, and the Assistant Attorney General, Civil Division. The meetings resulted in the issuance of a DOJ policy statement on August 31, 1977, which specifically states that hereinafter the Department will apply the same principles of equal employment opportunity law to the Federal Government which it has sought to have applied to all other public and private employers.[125/]

[124/] The Civil Division has argued that unless all members of a class file a complaint, class actions by Federal employers are barred; in contrast the opposite position has been taken by the Civil Rights Division with regard to all other employers. Similarly, the Civil Division has rejected the concept of continuing discrimination, a concept which the Civil Rights Division believes permits courts to consider and remedy charges of ongoing discrimination, notwithstanding Title VII's jurisdictional deadlines.

For a discussion of these and a number of other differences see memorandum from Rod Boggs, Executive Director, Washington Lawyers' Committee for Civil Rights Under Law, to Kelly Green, Department of Justice Transition Team, "Justice Department Civil Division and Civil Service Commission Positions on Title VII Rights of Federal Employees," Jan. 5, 1977.

[125/] Memorandum from Griffin Bell, Attorney General, to United States Attorneys and Agency General Counsels, "Title VII Litigation," Aug. 31, 1977.

Chapter 6

EQUAL EMPLOYMENT OPPORTUNITY COORDINATING COUNCIL (EEOCC)

I. Council Authority, Responsibility, and Membership

A. General

The statutory authority, responsibility, and membership of the Council have not changed since 1975. The five member agencies of the Council are the Department of Justice (DOJ), Department of Labor (DOL), the Civil Service Commission (CSC), the Equal Employment Opportunity Commission (EEOC), and the U.S. Commission on Civil Rights. Under the 1972 act, the five Council members are charged with the responsibility for:

> developing and implementing agreements, policies and practices designed to maximize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency among the operations, functions and jurisdictions of the various departments, agencies and branches of the Federal Government responsible for the implementation and enforcement of equal employment opportunity legislation, orders, and policies. 1/

The act also requires the Council to submit an annual report to the President and to Congress containing a description of its activities and any recommendations which the Council concludes are desirable for legislative or administrative changes to promote the purposes of Title VII. 2/

Officials from the Civil Service Commission and the Departments of Labor and Justice who participated in Council activities believe that there is some value in this body. 3/ Among the positive results reported

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1/ 42 U.S.C. 2000e 14.

2/ In April 1976, Title VI was amended to change the due date of this report from July 1 to October 1. 42 U.S.C. 2000e-14. As of October 1, 1977, no report had been submitted to the President for more than a year. The 1976 annual report, submitted in July 1976, described the Council's activities with regard to affirmative action, pensions, and employee selection guidelines, activities which are discussed *infra* this chapter.

3/ Interview with Carl Goodman, General Counsel, Civil Service Commission, July 20, 1977; interview with Harold R. Tyler, former Deputy Attorney General, Department of Justice, July 26, 1977; interview with William Kilberg, former Solicitor, Department of Labor, and Lawrence Lorber, former Director, Office of Federal Contract Compliance, Department of Labor, July 20, 1977; interview with Robert E. Hampton, former Chairman, CSC, July 25, 1977; and interview with David Rose, Employment Section, Civil Rights Division, Department of Justice, July 7, 1977.

were that the Council has served as a forum for discussion of ideas and exhange of information; it has been a means to facilitate cooperation among Federal agencies; it has made agency heads more aware of EEO procedures and policies in other agencies. The Department of Labor observed, "Because there are numerous diverse Federal programs which have EEO implications, we believe an effective coordination mechanism is essential."[4/]

The Equal Employment Opportunity Commission, on the other hand, shares the position espoused by the Commission on Civil Rights after it reviewed the activities of the Council in 1975[5/] that the Council should be abolished. Explaining its position, EEOC has stated:

4/ Attachment to letter from Donald W. Elisburg, Assistant Secretary for Employment Standards, U.S. Department of Labor, to Honorable Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights, Sept. 9, 1977 /hereinafter referred to as Elisburg letter/. The Department of Labor also stated:

> The present draft of Chapter 6, updating the Commission's evaluation of EEOCC's activities, would serve a more meaningful purpose if it addressed itself more constructively to why the Council has had difficulties and how the difficulties could be overcome. By focusing exclusively upon the slow start the EEOCC has had in undertaking its immense task, and by concluding without argument that the whole concept of a coordinating council is doomed, the present draft misses a number of critical points and does not do justice to this important subject. Id.

This Commission disagrees with the Department of Labor's conceptualization of this chapter. The Commission has attempted to address a number of issues, including the adequacy of Council decisionmaking, the need for additional members, the role of the principals and the staff, and the substance of the Council's work.

In August 1977, this Commission sent a copy of this chapter, in draft form, to the other four member agencies. Only the Department of Labor elected to respond.

5/ See The Federal Civil Rights Enforcement Effort--1974, Vol. V, To Eliminate Employment Discrimination 574-616, 673 (July 1975) [hereinafter referred to as Volume V].

> The Equal Employment Opportunity Commission concurs in this recommendation on the grounds that the EEOCC has not contributed positively to harmonizing government programs in this area, but has in fact had the opposite effect. [6]

The five diverse EEOCC agencies have been almost unable to make decisions by consensus, the process they agreed to in 1972. [7] Since 1975, the Council came to an agreement on only one major issue--affirmative action. Moreover, when agreement could not be reached, the Council did not strictly adhere to its decision to act only upon a consensus. The agencies could not agree on two of the three major issues it dealt with--pensions and employee selection guidelines. After failing to obtain a consensus with regard to pensions, the Council appeared to ask for assistance from the President in seeking a resolution. After failing to agree with regard to employee selection guidelines, the three agencies--CSC, DOL, and DOJ--who shared a majority view published the product of their agreement independently from the Council as "Federal Executive Agency Guidelines."[8]

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[6] Memorandum from Alfred W. Blumrosen, Special Assistant to the Chair, Equal Employment Opportunity Commission, to Steven Sacks, Office of Federal Civil Rights Evaluation, U.S. Commission on Civil Rights, July 25, 1977.

A former EEOCC Chairman, Harold Tyler, felt that given the structure of the Council, it should be abolished, but that a preferable course of action would be to strengthen the Council by expanding the agency membership and providing a decisionmaking mechanism. In Tyler's opinion, the Council, bolstered by those changes, could carry out its functions effectively. Tyler interview, supra note 3.

[7] DOL observed:

> The laws governing Federal civil rights policies are associated with programs with differing purposes, requiring approaches which may be at variance. Therefore, the implementing rules may not in some cases lend themselves to consensus, and the Council probably created unnecessary problems for itself. Elisburg letter, supra note 4.

There was also discussion among some members of the Council that it might request Congress to amend the 1972 act to include a decisionmaking process. This thought, however, was never seriously pursued because, as one principal[9] put it, "it was feared that opponents in Congress would only peck away at what authority the Council already had."[10]

Sporadic attempts outside the Council to formally resolve areas of disagreement among Federal agencies indicate the great and continuing need for interagency coordination. In some cases the need for coordination is not limited to the member agencies. Attempts at coordination have included:

- Affirmative action in higher education. The issue of whether the Federal Government should require institutions of higher education to conform to the same affirmative action standards applied to other Federal contractors has been considered at a White House meeting to obtain the views of academicians, a consultation with the Commission on Civil Rights, and a fact-finding hearing jointly sponsored by DOL and the Department of Health, Education, and Welfare (HEW).[11] As a result of the DOL/HEW hearings, the two agencies created an advisory committee to assist them in their consideration of the question. The question had not been resolved as of August 1977.

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[8] 41 Fed. Reg. 51734 (1976). The Council's actions on each of these issues are discussed in greater detail infra this section.

[9] The principals are the incumbents of the positions named in Title VII as belonging to the Council. Title VII states:

> The Equal Employment Opportunity Coordinating Council (hereinafter referred to as the Council) is composed of the Secretary of Labor, the Chairman of the Equal Employment Opportunity Commission, the Attorney General, the Chairman of the United States Civil Service Commission, and the Chairman of the United States Commission on Civil Rights, or their respective delegates. 42 U.S.C. § 2000e.

[10] Hampton interview, supra note 3.

[11] These various efforts are discussed in U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort--1974, Vol. VII, To Preserve, Protect, and Defend the Constitution 64-66 (June 1977).

A record of the Commission's consultation is published in U.S. Commission on Civil Rights, Affirmative Action in Employment in Higher Education, A Consultation Sponsored by the United States Commission on Civil Rights, Washington, D.C., Sept. 9-10, 1975.

- Affirmative action for State and local governments. Through a number of Federal Regional Councils (FRCs) there have been interagency agreements to adopt uniform instructions at the regional level for State and local government affirmative action plans. 12/

- Civil rights data collection. HEW, EEOC, DOL, DOJ, the General Accounting Office, the Office of Management and Budget, and the Department of Housing and Urban Development jointly agreed to adopt standardized categories and definitions for the collection of racial and ethnic data. 13/ Subsequently OMB translated this agreement into a requirement for all Federal agencies. 14/

EEOCC has been dormant since late 1976. The need for interagency coordination is increased as newly appointed officials take a fresh look at civil rights issues. As of September 1977, however, the EEOCC had not been reactivated. One major attempt at reaching an interagency agreement on the issue of employee selection guidelines was being carried out independently from the Council. 15/

12/ As of March 1976, FRCs in Atlanta, Dallas, Kansas City, and Philadelphia had developed such instructions.

13/ Memorandum from George E. Hall, Chief Social Statistics, Statistical Policy Division, OMB to the Ad Hoc Committee on Race/Ethnic Categories, Aug. 20, 1976.

14/ OMB, Circular A-46, Attachment F (May 12, 1977).

15/ EEOC wrote to this Commission that when its Chair, Eleanor Holmes Norton, took office in June 1977, she sought to develop uniform Federal guidelines on selection procedures through direct contact with the Assistant Attorney General for Civil Rights, the Commissioners of the Civil Service Commission, and the Assistant Secretary of Labor for Employment Standards, rather than through the EEOCC. She followed this course of action because serious disagreements among the member agencies had arisen when the Council had earlier considered the topic of selection procedures, and the Council had proved ineffective in resolving the differences. Blumrosen memorandum, supra note 4.

Although the Council membership has not changed since its creation, the Council has on occasion found that if it is to serve its purpose of interagency coordination, it must include other agencies in its deliberations.[16] As noted by the Department of Labor, the Council has an inflexible membership which excludes several Federal agencies with important civil rights responsibilities.[17] Although DOL believes that the Council's composition precludes the EEOCC from proper consideration of some pressing issues,[18] the EEOCC has occasionally engaged in coordination with nonmember agencies. For example, HEW was invited to send a representative to attend Council meetings and to participate in discussions regarding Federal uniformity on the pension issue. The Department of the Treasury was asked to participate in discussions on affirmative action programs for State and local government agencies. In addition, an OMB official attended most of the Council meetings, and the White House occasionally sent a representative, as well.

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[16] DOL wrote to this Commission, "We agree with the Council's implied position that other Federal agencies with civil rights interests should be involved in the Council activities." Elisburg letter, supra note 4.

[17] Id.

[18] Id.

B. Membership of the U.S. Commission on Civil Rights

The Department of Labor has stated:

> /T/he membership of the Commission /on Civil Rights/ itself on the Council has been a handicapping factor. Unlike the other members, it has no responsibilities for the enforcement of Federal Civil Rights programs, and, therefore, cannot be an equal partner in the quest for mutual accommodation when sensitive issues are negotiated among the members. 19/

This Commission agrees that considering the Council's mandate, the Commission's presence on it is an anomaly. Given the Commission's limited authority in the employment area--"to study and collect information," "appraise laws and policies," and report its findings and recommendations--its activities constitute a very small part of what the Council is required to coordinate. In fact, the only Commission activity which might be susceptible to Council coordination is its pursuit (by subpoenas or requests) of information from employers.

Further, this Commission's presence on the Council implies a contribution to its activities and puts the Commission in an awkward position in evaluating the Council, as, for example, it has done in this report and in Volume V. A possible response by other Council members to Commission evaluations of the Council is that the Commission, as a member agency, had the rights and responsibility to act as a Council member to correct the deficiencies at the time the Commission observed them. Evaluations such as this one may place a strain on the tenuous cooperative spirit which has

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19/ Elisburg letter, supra note 4. Staff from other agencies have also raised questions about the wisdom of this Commission's membership on the Council. Rose interview, supra note 3; telephone interview with Peter Robertson, Director, Office of Federal Liaison, EEOC, Sept. 28, 1977. Mr. Robertson suggested that possibly the Commission on Civil Rights should have observer status, rather than participant status, on the Council.

developed among Council staff and principals. Yet, if this Commission does not criticize the Council for its lack of progress, it is not fulfilling its legislative responsibility.

There have been some advantages to the Commission on Civil Rights membership on the Council. As a result of its factfinding activities, the Commission has brought to the Council an overview of equal employment opportunity activities throughout the Government. In addition, the evaluations made by the Commission outside the Council are generally _a posteriori_, after policy has been developed an implemented. The Commission's presence on the Council has permitted it to become cognizant of proposed changes. Thus, the Commission's presence has given the other member agencies notice of the Commission's recommendations when they could have the most effect, prior to implementation of proposed changes. However, in balance this Commission does not believe that it should be a member of the Council or that the Council should be continued.

II. The Principals and the Staff

From July 1975 through November 1976, the principals, i.e., the agency representatives named in the act creating the Council, were more active than previously in the Council's history. [20] During this period, Council principals met at least once a month on a regular basis. [21] In addition they sometimes met to discuss issues over lunch. [22]

Many who served as staff to the Council believe that it was the active involvement and participation of principals that determined whether the work on Council activities went forward. Some staff indicated that it was only the commitment and zeal of certain principals which kept the Council from being totally inactive. [23] This assertion would appear to be borne out by the Council's dormancy since late 1976.

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[20] Telephone interview with David Rose, Chief, Employment Section, Civil Rights Division, DOJ, Aug. 16, 1977.

[21] Telephone interview with Carl Goodman, General Counsel, CSC, Aug. 16, 1977. In contrast, as of February 1975, the Council had met only 11 times in its almost 3 years of existence. See Volume V, supra note 5, at 594.

[22] Lorber and Kilberg interview, supra note 3; Goodman interview, supra note 3; and interview with Peter Robertson, Director, Office of Federal Liaison, EEOC, Aug. 12, 1977.

[23] Goodman interview, supra note 3; Lorber and Kilberg interview, supra note 3; and Rose interview, supra note 3.

Although staff who assisted the Council had difficulty estimating the amount of time they spent on Council activities,[24] it appears from the information available that considerably more time was spent in staff work between July 1975 and November 1976 than in the Council's earlier days.

The Council had no permanent full-time staff.[25] From July 1975 to November 1976, the number of staff assigned by the member agencies to the Council changed frequently.[26] There generally appeared to have been one or two staff representatives from each member agency who attended most of the staff meetings.[27] In addition, staff with special expertise were assigned to the Council to assist with technical questions. For example, while the Council considered the issue of pensions, DOL provided two actuaries to work full-time on the issue. Two psychologists from DOL also assisted the Council in its deliberation over tests used for employee selection.

The amount of time staff spent on Council activities was not constant. When the Council was working on a project, it might hold 2 or 3 meetings a week each lasting 4 or 5 hours. Time was also spent doing research, developing material for the staff to consider, reviewing staff work, and briefing the principals.[28] Former staff members stated that they could not confidently make estimates as to how much time they devoted to the Council.

24/ Rose interview, supra note 20;Lorber and Kilberg interview, supra note 3; and Robertson interview, supra note 22.

25/ DOL stated, " The /Commission on Civil Rights/ does not seem to give full appreciation to the fact that a great deal of EEOCC's problems stem from lack of a strong, permanent staff." Elisburg letter, supra note 4.

26/ Rose telephone interview, supra note 22.

27/ These representatives included the Solicitor of Labor, the Director of the Office of Federal Contract Compliance Programs, DOL; the Chief of the Employment Section, Civil Rights Division, DOJ; the Executive Director, and the General Counsel, CSC; and the Director, Office of Federal Liaison, EEOC.

28/ The former Solicitor of Labor, for example, estimated that he might have spent 6 or 7 hours a month briefing the principals.

III. Council Activities

From July 1975 to November 1976, the Council was preoccupied with the complex issues of employee selection guidelines, sex discrimination in pensions, and affirmative action. This has effectively precluded it from dealing with a number of other important subject matter areas. Areas in which coordination is needed include uniform data collection procedures, joint training programs, sharing of information, and standards for complaint investigation and compliance reviews.

In addition, the Council was unable to spend time on two issues which it had, at a meeting in May 1975, committed itself to address: 1) In May 1975, after considering allegations that foreign governments or companies had been instrumental in forcing United States companies not to do business with or employ persons of the Jewish religion, the Council agreed to look into means of preventing discrimination which might arise as a result of foreign governments' practices.[29] 2) The Council also indicated that it would take under advisement a set of draft guidelines on work allocation procedures to be used in case of layoffs, developed by the Equal Employment Opportunity Commission.[30]

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[29] EEOCC, Annual Report, July 1, 1975.

[30] Id.

A. Affirmative Action

The Council issued uniform Federal guidelines on affirmative action which resolved some of the major areas of disagreement among the member agencies. In September 1976, the EEOCC issued a policy statement on affirmative action programs for State and local government agencies.[31] All five member agencies, joined by the Department of the Treasury,[32] signed the statement. It represents the only project the full EEOCC successfully completed.[33]

The primary impetus for the affirmative action project came from the experiences of two States, Michigan and Washington. In Michigan, a Governor's task force, after finding underutilization of minorities and women in State employment, had adopted a policy of expanded certification[34] to increase the number of women and minorities employed by the State. The U.S. Civil Service Commission objected to the policy as reverse discrimination.[35] The Michigan Human Rights Commission perceived the expanded certification policy as an attempt to achieve compliance with Title VII by increasing the pool of qualified minority and female applicants, and it wrote to the EEOCC to express this view. Similar events occurred in Washington State. A remedial program using a three-plus-three rule[36] was instituted after State employment statistics indicating *prima facie* violations of Title VII were released. CSC also found this program to remedy underutilization to be itself violative of Federal law. In an attempt to resolve the State's dilemma, the Governor of Washington contacted the Chairman of the EEOCC several times.[37]

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[31] 41 Fed. Reg. 38814 (Sept. 13, 1976).

[32] The Department of the Treasury was included because of its responsibilities for general revenue sharing.

[33] DOL observed, "The evidence that the EEOCC has been effective spasmodically suggests that its problems may be more organizational than conceptual. ... " Elisburg letter, supra note 4.

[34] Michigan's personnel regulations provide for selection from among the top three candidates on employee certificates, i.e., list of qualified applicants. The expanded certification policy permits the selecting official to choose from candidates beneath the top three under certain conditions. These conditions are that the employing agency is attempting to fill the particular position to meet the requirements of an affirmative action plan, the employment test or test used in rating the eligibles has not been validated, and the selecting official certifies that the person selected is equally as qualified as the top three candidates. These regulations are discussed in Volume V, supra note 5, at 204.

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[35] CSC's responsibilities for equal opportunity in State and local government employment are discussed in *Volume V*, *supra* note 5 at 138-229.

[36] The State of Washington also required that vacancies be filled from the three top candidates on employee certificates. The "three-plus-three" rule could be used when there was a showing of past discrimination. It permitted the addition of three top minority or female candidates if the original list contained no minorities or women.

[37] Tyler interview, *supra* note 3. The Governor of Washington was Daniel Evans.

The experiences in Michigan and Washington increased the Council's awareness that local governments faced inconsistent guidance from Federal agencies concerning affirmative action. In addition, at least one Federal Regional Council, perplexed by differing Federal agency standards for affirmative action, had asked the EEOCC for help.[38/] As a result, both staff and principals were interested in undertaking a project to harmonize Federal affirmative action policies,[39/] and the EEOCC committed itself to an affirmative action project.[40/]

In order to initiate the project, the Chairman of the Commission on Civil Rights, at the January 1976 meeting of the EEOCC, asked the staff to prepare a paper presenting the substantive issues and noting member agencies' disagreements.[41/] The paper[42/] included the following informal findings:

[38/] This was the New England Regional Council. Memorandum from David W. Hays, Chairman, New England Federal Regional Council to Fernando Oaxaca, Associate Director for Management and Operations, Office of Management and Budget, Sept. 29, 1975; and letter from Fernando Oaxaca to Harold R. Tyler, Jr., Chairman, EEOCC, Nov. 17, 1975. See also Tyler interview, supra note 3

[39/] Lorber and Kilberg interview, supra note 3.

[40/] Robertson interview, supra note 22.

[41/] Although Chairman Flemming had asked for an outline of each agency's position on the issues, the paper was not entirely complete in that respect. The discussion of the issues and findings is therefore limited to the information included in the paper.

[42/] Attachment to memorandum from Phebe C. Miller, Department of Justice, to Equal Employment Opportunity Coordinating Council, Jan. 11, 1976. The paper did not list the positions of all member agencies on each issue.

1. The member agencies agreed on most affirmative action principles,[43] for example, the propriety of outreach recruitment programs, job restructuring, and other pre-employment decision actions.[44]

2. The agencies agreed that veterans preference laws, which have an inhibiting effect on opportunities for women, should be modified.[45]

3. While all agencies supported a relaxation of extremely narrow rules of certification (e.g., the rule of three),[46] they did not agree on the extent of the relaxation: EEOC advocated whole list certification;[47] CSC opposed that position and proposed that certification of a limited number of potential employees was necessary to preserve merit hiring.

4. All agencies did not concur that, when there had been a showing of past discrimination, race, religion, sex, or national origin could be used as a selective factor in order to achieve an affirmative action

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[43] EEOCC Minutes, Jan 19. 1976.

[44] The staff, apparently seeking to emphasize areas of agreement, characterized the extent of agreement as encompassing "most" affirmative action principles. That view appears not to take into account the fact that differences of opinion existed on most major points.

[45] Veterans preference is discussed more fully in Chapter 1, The Civil Service Commission, supra.

[46] The rule of three is discussed in notes 34 and 36 supra and in Chapter 1, The Civil Service Commission.

[47] Whole list certification would permit the selection official to choose any candidate from an employee certificate.

goal. In line with this dispute, disagreement existed over the appropriateness of selective certification. EEOC and this Commission endorsed the use of race, ethnic origin, or sex as selective factors to eliminate past discrimination. CSC felt that unless the selective factors were related to job performance, such a system would violate merit principles and Title VII.

5. Disagreement existed over whether voluntary affirmative action by an employer may consist of action which a court could order only after a finding of discrimination. Actions in question included whole list certification and use of sex, race, or ethnic origin as a factor to achieve a hiring goal. EEOC and this Commission believed that an employer who discovered underutilization in his or her workforce could voluntarily take any remedial action a court could order. CSC felt that, absent a court order, such remedies could be violative of Title VII. DOL took the position that while a judge under the aegis of the court could order race conscious hiring, an administrator could not.

6. Another controversy within the Council was the acceptability of failure to achieve a goal. EEOC, DOJ, and the Commission on Civil Rights believed that failure would be excused only if there was an insufficient supply of qualified minority and female applicants. CSC believed that failure were excusable if there was adherence to "relative ability ranking," i.e., selection from among the most qualified applicants.

7. Last, the agencies disagreed over the use of a non-valid test with discriminatory impact when the employer had agreed to remedy the impact. EEOC, DOJ, and the Commission on Civil Rights would allow the use of a non-valid test as part of an affirmative action plan if the employer would agree to hire in such a way as to do away with the discriminatory impact of the test. CSC would require the use of a different test.

A period of negotiation and compromise followed the paper which isolated the issues. The EEOCC proceeded to focus and expand on areas of agreement. By August 5, 1976, the Council staff had completed a working draft of an affirmative action policy statement. In mid-September the Council adopted it and published it in the Federal Register.[48]

The statement attempts to establish neither minimum nor maximum affirmative action steps by an employer. The Council provided examples of the kinds of analyses and activities which a State or local government could effect if it chose to do so. The language of the statement is permissive rather than directive.

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[48] 41 Fed. Reg. 38814 (Sept. 13, 1976).

Most significantly, the statement endorsed steps which "in design and execution may be race, color, sex, or ethnic conscious...." One such step included in the list of affirmative action possibilities was "the initiation of measures designed to assure that members of the affected group are included within the pool of persons from which the selecting official makes the selection."[49/] This provision gives notice that expanded certification systems, such as those proposed by Michigan and Washington, are legitimate affirmative action procedures. It has been lauded as the most significant aspect of the policy statement.[50/] In addition, the Council agreed that the following affirmative action principles could be voluntarily adopted by State and local governments:

1. The first step in the construction of any affirmative action plan should be a comparison of the employer's work force with that available in the relevant job market. The Council did not supply guidance with regard to how analyses should be done, however.

2. When disparities are found, an examination could follow of each element of the selection process, including a determination of its validity in predicting job performance.

3. When an employer has reason to believe that its selection procedures have an exclusionary effect, affirmative steps, including the following may be appropriate:

   - Establishment of goals and timetables taking into account the availability of basically qualified persons;

[49/] 41 Fed. Reg. 38814 (Sept. 13, 1976).

[50/] Robertson interview, supra note 22.

- A recruitment program designed to attract qualified members of the underrepresented group;
- Reorganization of work and jobs to allow entry by persons lacking "journeyman" experience;
- Revamping selection instruments or procedures to reduce exclusionary effects on particular groups in particular job classifications;
- A systematic effort to provide career advancement training;
- Establishment of a self-monitoring system with procedures for making adjustments.

Each Council member and the General Counsel for the Department of the Treasury signed the statement. The EEOCC, as a body, had issued a statement which reflected a consensus among six Federal agencies. Building consensus among agencies with disparate philosophies and functions necessitated flexibility, commitment to the task, and hard work, and the achievement of a uniform policy was, therefore, a praiseworthy accomplishment.

However, the substance of the statement glossed over areas of disagreement and centered instead on general principles. DOL observed, "If building consensus among six agencies with 'disparate philosophies and functions' requires commitment and hard work, it is reasonable to expect that such a product might gloss over areas of disagreement and center on general principles."[51]

Nonetheless, the statement did not address some important issues. For example, the question of under what circumstances the failure to achieve a goal would be acceptable was left unresolved. In addition, the EEOCC statement ignored the issue of the use of unvalidated tests when an employer has agreed to remedy discriminatory impact. The subject of veterans preference was not mentioned. None of these issues was addressed elsewhere by the Council, either.

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[51] Elisburg letter, *supra* note 4.

Further, the fact that EEOCC has attempted to achieve uniformity only for State and local governments and not for private employers is a serious limitation.[52] Private employers are also burdened by duplicative and inconsistent Federal requirements for affirmative action.[53] Yet, the Executive branch offers no effective guidance in handling such differences.

Finally, adherence to the guidance in the statement would not be as effective in eliminating the effects of past discrimination as would adherence to the requirements of Revised Order No. 4 of the Office of

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[52] DOL commented, "Nothing in the policy statement discourages its use by private employers as guidance; it is intended as guidance, in fact, even for State and local government employers." Id.

[53] Examples of such burdens are given in Volume V, supra note 5, at 537-78.

Federal Contract Compliance Programs.[54] Together Revised Order No. 4 and the EEOCC statement do not provide employers with conflicting requirements. The EEOCC statement merely describes an agreement as to some procedures which are permissible under the law. It does not purport to describe comprehensively all procedures which are necessary to achieve equal opportunity. Since the EEOCC statement and Revised Order No. 4 do not technically conflict with each other, the discrepancies between the two standards did not provide a reason for any of the Council members to refrain from signing the statement. The discrepancies do indicate, however, the distance which has yet to be covered if uniform Federal affirmative action requirements are to be achieved.

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[54] The major difference between the two is as follows: An affirmative action plan developed pursuant to Revised Order No. 4., 41 C.F.R. § 60-2 (1976), would require both revision of any discriminatory selection procedures to ensure against discrimination in the future and the setting of goals and timetables to eliminate any underutilization caused by past discrimination. An affirmative action plan developed pursuant to the EEOCC statement, however, would be designed only to ensure against discrimination in the future, but not to eliminate past discrimination. It would require revision of discriminatory selection procedures but it would require goals and timetables only if the selection procedures were currently having a discriminatory impact. If an employer did not have discriminatory selection procedures, no goals and timetables would be called for even if the composition of its work force clearly evidenced past discrimination. An example would be: An employer has an all male work force because of a prohibition against hiring women; however, the prohibition was recently eliminated; under the EEOCC statement the employer would not set goals and timetables to remedy the past discrimination. The Commission has endorsed Revised Order No. 4 as describing the steps necessary for any employer to ensure nondiscrimination in its employment practices and to affirmatively eliminate underutilization of minorities or women. U.S. Commission on Civil Rights, Statement on Affirmative Action for Equal Employment Opportunities (February 1973).

The Department of Labor wrote to this Commission:

> Requirements on employers contracting with the Federal Government not to violate E.O. 11246, as amended, may be much higher than general requirements of employers not to violate Title VII. It is very likely that no such thing as "uniform Federal affirmative action requirements" can legally ever be developed due to the differing statutory bases for EEO enforcement by the differing agencies. It is not clear, for example, that EEOC could issue affirmative action "requirements." It is, therefore, misleading to cite an example of a "praiseworthy accomplishment" as somewhat defective because it did not accomplish a task that may well be impossible. 55/

This Commission disagrees with DOL's position. It has long held that under the affirmative action requirements of Executive Order No. 11246: 56/

> ...contract compliance agencies are asking nothing more of potential contractors than would be the case in a proceeding under Title VII. Potential Federal contractors merely are being asked, as a condition for obtaining a lucrative government contract, to follow voluntarily procedures that they are, for the most part, required to follow under Title VII. 57/

55/ Elisburg letter, *supra* note 4.

56/ 3 C.F.R. 1964-65 Comp. p. 341 as amended by Executive Order No. 11375, 3 C.F.R., 1966-1970 Comp. p. 606 (1967).

57/ Statement by Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights, Before the Fact-finding Hearing Convened by the Secretary of Labor on the Implementation of Executive Order 11246 Affirmative Action Requirements As Applied to Employment at Institutions of Higher Education, Nov. 12, 1975.

B. Sex Discrimination in Pension Benefits

Although the member agencies and HEW all share the belief that sex should not be a factor in determining size of periodic benefits, they were unable to agree on a recommendation for translating their beliefs into an enforceable public policy. In May 1975 Council principals directed the staff to consider the issue of sex discrimination in pension benefits and to invite representatives of HEW to participate in the discussions.[58] The task before the Council was to decide whether the payment of unequal periodic benefits to female and male retirees -- which result from the use of sex-based actuarial tables -- was contrary to public policy under Executive Order 11246,[59] the Equal Pay Act of 1963, as amended,[60] Title VII of the Civil Rights Act,[61] and Title IX of the Education Amendments of 1972.[62] Actuarial tables, which predict life expectancy, are used to calculate the amount that must be contributed by the sponsor of a pension plan (the employer) to finance the promised benefits to the employee.[63] The problem arises because women, on the average, live longer than men. If sex-based actuarial tables are used and the employer contributes equal amounts for male and female employees, women will receive smaller periodic benefits.[64] If similarly situated male and female retirees are to receive equal periodic benefits, the employer must contribute greater amounts for female employees.

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[58] EEOCC Minutes, May 2, 1975.

[59] 3 C.F.R. (1964-1965 Comp.) p. 339.

[60] 29 U.S.C. § 206(d)(1) (Supp. V, 1975).

[61] 42 U.S.C. § 2000d (Supp. V, 1975).

[62] 20 U.S.C. § 1681 (Supp. V, 1975). Letter and attachment from John T. Dunlop, Secretary of Labor, to Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights, Sept. 2, 1975.

[63] *Id.*

[64] However, the total benefits received by women as a group in their lifetimes will be equal to that received by men as a group.

The member agencies of the EEOCC entered discussions on the pension issue with conflicting views. DOL's guidelines permitted employers to comply with Executive Order 11246 by providing either equal contributions or equal benefits; EEOC's guidelines required equal periodic benefits for compliance with Title VII; CSC opposed sudden change but wanted to move in the direction of equal benefits; DOJ called for more research; and the Commission on Civil Rights deferred its comments until its representatives had examined a report prepared by DOL.[65]

HEW had confronted the issue when developing regulations to implement Title IX of the Education Amendments of 1972.[66] In its position statement on the subject, HEW commented that "this is a most complex area which is further complicated by the fact that at least three Federal agencies administer rules on this subject."[67] HEW adopted the position of DOL for its Title IX regulations, but its difficulties with the other agencies' uncoordinated rules brought the lack of uniformity to the President's attention.[68] On June 17, 1975, President Ford requested that the EEOCC work with HEW "to promptly develop a single approach to this issue" and make a recommendation to him by October 15, 1975.[69]

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[65] EEOCC Minutes, Sept. 18, 1975, at 3-4.

[66] 20 U.S.C. §§ 1681 - 1686 (Supp. V, 1975). Title IX prohibits sex discrimination in federally assisted education programs.

[67] Statement by Caspar W. Weinberger, Secretary of HEW, for release to press June 3, 1975, at 3.

[68] Memorandum from Peter C. Robertson, Director, Office of Federal Liaison, EEOC, to Ethel Bent Walsh, Vice Chairperson, Colston Lewis, Raymond Telles, Daniel Leach, Commissioners, EEOC, Pension Briefing, Mar. 25, 1976.

[69] Memorandum from James M. Cannon, Assistant to the President for Domestic Affairs, to Harold R. Tyler, Jr., Deputy Attorney General, June 17, 1975.

The Council staff researched, debated, and sought to negotiate a position agreeable to all. Several aspects of the subject complicated discussions on this issue. Among those elements were:

- The diversity of employers and employees involved;
- The costs of effecting changes in pension plans, and
- The time necessary to implement an equal benefits requirement.[70]

As negotiations progressed, all agencies agreed that the payment of equal periodic benefits regardless of sex was an advisable social policy goal. Disagreements persisted on how to achieve that end.[71] The areas of controversy included:

- Extension of equal contributions to optional survivors benefit plans (EEOC agreed; other agencies advocated equal benefits only to the employee);
- The effective date;
- The possibility of lump-sum annuities as a means for employers to avoid compliance, and
- Whether to implement an equal benefits policy by legislation or by regulation.[72]

In early October 1975 the Council Chairman wrote to the President summarizing the problem and reporting that the members of the Council had reached a consensus on the desirability of "equal benefits" as a social policy. The Council members agreed that:

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[70] EEOCC Minutes, Sept. 18, 1975.

[71] Lorber and Kilberg interview, supra note 3; memorandum to Coordinating Council, undated, setting forth the recommendation of DOL, CSC, and HEW; letter from Harold Tyler, Deputy Attorney General to President Gerald R. Ford, Oct. 18, 1975.

[72] Robertson memorandum, supra note 68; EEOCC Minutes, Sept. 18, 1975.

> The Federal government should consider moving toward a posture of payment of equal periodic benefits, without regard to sex, if that can be achieved without endangering the safety of present retirement plans, and without demonstrably prohibitive increases in costs to employers and employees. [73]

The Council requested six months beyond the October 15th deadline to complete its study and prepare recommendations. The President agreed to an April 15, 1976 deadline.[74]

Although agency staff who worked on Council issues felt they could not accurately estimate the amount of time each agency devoted to the question of pension benefits, it is clear that for almost a year, from May 1975 to April 1976, considerable resources were invested.[75] For example, DOL committed the services of its only two actuaries.[76] Computer time was obtained. Data from the Bureau of Labor Statistics was utilized. According to two former staff members, the labor and resources invested were "priceless."[77]

The staff drafted a recommendation to the President which was agreed to by staff and principals from each agency.[78] The letter expressed the view of the member agencies and HEW that "employees who have received equal pay and status during their working years ought to be assured of an equal income during retirement," and that periodic payments should not reflect a differentiation based on sex.[79] The letter recommended that legislation be introduced which would:

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[73] Oct. 18, 1975, Tyler letter, *supra* note 71.

[74] Letter from James Cannon, Assistant to the President for Domestic Affairs, to Harold R. Tyler, Jr., Deputy Attorney General, Nov. 11, 1975.

[75] Lorber and Kilberg interview, *supra* note 3.

[76] *Id.*

[77] *Id.*

> 1. Establish a cut-off date after which time all periodic benefits payments shall not reflect a differentiation based on sex. January 1, 1980, was mentioned as a possibility.
>
> 2. Require that lump sum retirement benefits, after an established date, be in amounts sufficient to purchase equal life annuities.[80]

The letter contains a paragraph making clear that although this Commission signed the letter, it believed that a) Title VII prohibits the practice of paying unequal periodic benefits; b) case law fully justifies EEOC's guidelines; c) no need exists for legislation, and d) if legislation is proposed, Congress should consider mandating sex-neutral practices by the insurance industry.[81] There was no parallel statement for EEOC although the letter did note EEOC's belief that Title VII and the Employer Retirement Income Security Act of 1974[82] mandate that equal periodic payments should also apply to survivors' options.

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[78] Interview with David Rose, Chief, Employment Section, Civil Rights Division, DOJ, July 18, 1977; Lorber and Kilberg interview, supra note 3.

[79] Letter from Harold R. Tyler, Jr., Deputy Attorney General, W.J. Usery, Secretary of Labor, David Mathews, Secretary of Health, Education, and Welfare, Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights, and Robert E. Hampton, Chairman, Civil Service Commission to President Gerald R. Ford, Apr. 14, 1976.

[80] Id.

EEOC ultimately would not sign the letter and it was sent to the President without EEOC's endorsement. A cover letter from the Council Chairman explained that unanimous agreement on the substance of the letter "subject to certain redrafting and expansion of details" had been reached at the meeting on March 30, 1976, but that EEOC ultimately was unwilling to sign the letter "for reasons which would have required re-opening the interagency discussions."[83]

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[81] Id.

[82] 29 U.S.C. § 1001-1381 (Supp. V, 1975). This act is commonly referred to by its acronym, "ERISA."

[83] Letter from Harold R. Tyler, Jr., Deputy Attorney General to President Gerald R. Ford, Apr. 15, 1977.

Although the chairman did not elaborate on the "reasons" in this letter to the President, the problem which apparently led to the collapse of this EEOCC effort was a relatively small one which, seemingly, could have been resolved bv the addition of a further statement by EEOC .[84/] However, the Council did not ask the President for further time to consider the matter. Thus, it appeared to be turning to the President for the final policy decision instead of carrying out the responsibility which had been entrusted to it by the Congress to eliminate conflict and inconsistencies among agencies with equal employment opportunity responsibilities.

While the enormous work done in preparation for the April 15 letter to President Ford may be useful to policymakers at some future date, some of the staff who worked on the issue have left the Government, and the agencies for which they once worked have not preserved all their files.[85/] As of August 1977, 16 months after the letter was sent to the President, no further progress had been made.

[84/] The inclusion of the paragraph explaining that the Commission on Civil Rights believed existing law prohibited unequal benefits was reportedly the grounds for EEOC's refusal to sign the letter. EEOC feared that its signature without a special qualifying comment parallel to the Commission on Civil Rights' statement of beliefs would be interpreted as an acknowledgment of a need for additional legislation. In order to avoid undermining its position that Federal law currently mandated equal benefits, EEOC chose not to take any action which could appear as equivocation. Telephone interview with Peter Robertson, EEOC representative to EEOCC, Aug. 12, 1977.

[85/] The Department of Labor noted, however, that:

> All of the /Employment Standards Administration and Labor-Management Services Administration/ staff /at DOL/ are still with their respective agencies. The actuary with the CSC is still in her position. The EEOC staff members who participated most actively are still present. The research data is available. Elisburg letter, supra note 4.

C. Employee Selection Guidelines

After more than three and one half years, the Council has not been successful in achieving a uniform procedure on employee selection procedures. Negotiations and discussions towards developing uniform guidelines began in early 1973. They ended in November 1976 with agreement achieved among only three of the five EEOCC member agencies[86] and the issuance by these three agencies of "Federal Executive Agency (FEA) Guidelines on Employee Selection Procedures."[87]

The history of the FEA guidelines has been described in the introduction to their publication in the Federal Register. To summarize that history briefly: Staff working with the EEOCC developed a staff proposal for uniform guidelines on employee selection dated September 24, 1975. The staffs of CSC, DOL, DOJ, and EEOC agreed to circulate this proposal for analysis and comment. However, after reviewing the staff proposal, the EEOC commissioners determined that it did not represent the position of EEOC. Nonetheless, in the interest of developing uniform guidelines, a majority of the principals recommended that the staff proposal be circulated for prepublication comment. After it was circulated, it was modified and then published for comment as proposed guidelines in the Federal Register in July 1976.[88]

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[86] These agencies were CSC, DOJ, and DOL.

[87] 41 Fed. Reg. 51734 (Nov. 23, 1977). These guidelines were termed "Federal Executive Agency" guidelines after a consensus could not be reached among Council members.

[88] 41 Fed. Reg. 29016 (July 14, 1976).

The proposed guidelines were, in many respects, an improvement over EEOC's guidelines. As this Commission noted, the proposed guidelines:

- Extended to licensing and certification boards, in recognition of developing case law.
- Required that selection procedures be administered and scored under standardized conditions.
- Established standards for content validity studies.
- Established standards for construct validity. [89]

However, in this Commission's view, the strengths of the proposed guidelines were far outweighed by their weaknesses. The following are a few of the many ways in which the proposed guidelines were less rigorous than the EEOC guidelines:[90]

- The test user (employer) does not have to demonstrate that a selection device is practically significant. [91]

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[89] These are examples of the seven provisions of the proposed guidelines which this Commission listed as being stronger than EEOC guidelines. Letter from Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights to Harold R. Tyler, Jr., Chairman, Equal Employment Opportunity Coordinating Council, Aug. 27, 1976 /hereinafter referred to as Flemming letter/.

[90] More than 30 instances of "lessened coverage" were listed by the Commission on Civil Rights. Id.

[91] DOL has written to this Commission, "The test used must now demonstrate that the test is 'appropriate for operational use', a concept which incorporates practical utility and goes beyond it to include other considerations." Elisburg letter, supra note 4, This assertion does not appear to be supported by the FEA guidelines which require the user to make a reasonable effort to investigate suitable alternative procedures for the purpose of determining the "appropriateness" of using or validating them in accord with the guidelines. The guidelines do not define "appropriateness" or otherwise indicate that they incorporate the concept of practical significance. In contrast, EEOC's guidelines clearly state, "In addition to statistical significance, the relationship between the test and criterion should have practical significance." 29 C.F.R. § 1607.5(c).

- The burden of showing that validity studies are not technically feasible is no longer on the test user. [92]

- The test user no longer has to eliminate adverse impact if validation studies are not performed. Instead, the test user is presented with the option: "eliminate the adverse impact or otherwise justify continued use of the procedure in accord with Federal law." [93]

- The preference for criterion-related validity [94] studies is abandoned.

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[92] DOL stated that, "The burden for showing infeasibility is obviously still on the user; it could be shown by no one else." Elisburg letter, supra note 4 This statement does not appear to be fully supported by a comparison of EEOC's guidelines with the FEA guidelines. EEOC's guidelines clearly state "...where technically feasible, a test should be validated for each minority group with which it is used....It is the responsibility of the person claiming absence of technical feasibility to positively demonstrate evidence of this absence." 29 C.F.R. § 1607.4(b). There is no comparable statement in the FEA guidelines, although those guidelines do state that validation according to the guidelines may not always be feasible or appropriate.

[93] 41 C.F.R. § 60-3.3(b).

[94] Criterion-related validity is shown by demonstrating a statistical relationship between the test and some important measure of job performance. It is contrasted with 1) content validity, which is shown by evidence that a test is a representative and statistically reliable sample of actual work skills or tasks, and 2) construct validity, which is shown by demonstrating a statistical relationship between a test and some construct, or personality trait, and that the construct is required for satisfactory performance of the job. This Commission has supported criterion-related validity as being the most reliable means of assuring that a test predicts job performance.

DOL wrote to this Commission, "There is no basis in the psychological profession for a preference for criterion-related validation; the EEOC Guidelines, in fact, contain no such preference." Elisburg letter, supra note 4. The Department of Labor apparently ignores the section of EEOC's guidelines which states:

> For the purpose of satisfying the requirements of this part, empirical evidence in support of a test's validity must be based on studies employing generally accepted procedures for determining criterion-related validity....Evidence of content or construct validity....may also be appropriate where criterion-related validity is not appropriate. 29 C.F.R. § 1607.5 (a).

This Commission also believes that there is a strong basis in the psychological literature for a preference for criterion-related validation. See Flemming letter, supra note 89.

In conclusion, the Commission on Civil Rights commented on the proposed guidelines:

> In brief, the Commission believes that the proposed guidelines would significantly undermine the minimal achievements made by women and minorities in moving toward equal employment opportunity. Under the proposed guidelines, employers would be permitted to use unvalidated selection instruments which lack usefulness and, in our view, have no demonstrable relationship to an employee's ability to perform on the job. Employers ...would be discouraged from using empirical validity studies, and they would be exempted from requirements to adjust their instruments for fairness. 95/

EEOC also preferred its own guidelines. The proposed guidelines were nonetheless supported by the three other member agencies: DOJ, DOL, and CSC.

95/ Flemming letter, supra note 89.

At its October 13, 1976 meeting, the Council concluded that it could not achieve a uniform Federal policy. Instead, DOJ, DOL, and CSC adopted as Federal Executive Agency (FEA) guidelines, the work product developed under the auspices of the Council. It appears that these guidelines, issued November 23, 1976, differed only slightly from the proposed guidelines published for comment in July of that year. The issuing agencies gave their own perceptions of the guidelines:[96]

1. The guidelines better represented professionally accepted standards for determining validity than any existing set of guidelines.
2. The guidelines were more consistent with decisions of the Supreme Court and the authoritative decisions of the other appellate courts, despite the deference given by the Supreme Court to EEOC's guidelines.
3. The guidelines provided practical guidance on how to comply with Federal law.
4. Adoption of the guidelines was a step toward a uniform Federal position. The guidelines applied to the Federal Government itself, as well as Government contractors.

Thus, after November 23, 1976, the FEA guidelines existed simultaneously with the EEOC guidelines. While agreement among three agencies is laudable, the four years of effort towards a uniform Federal policy culminated in failure, and the lack of a uniform position has continued to cause problems. For example, in April 1977, the Office of Revenue Sharing (ORS) of the Department of the Treasury incorporated EEOC's guidelines into its reissued interim revenue sharing regulations.[97]

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[96] 41 Fed. Reg. 51734 (Nov. 23, 1976).

[97] These regulations govern the payment of entitlements under Title I of the State and Local Fiscal Assistance Act of 1972. 42 Fed. Reg. 18366 (Apr. 6, 1977) (to be codified in 31 C.F.R. § 51.53(b)).

The Law Enforcement Assistance Administration (LEAA), on the other hand, requires agencies receiving funds under the Crime Control Act to follow the FEA guidelines.[98/] Both the LEAA and ORS instructions apply to police departments, aggravating the confusion over conflicting sets of standards.

The tension created by the persistence of two sets of guidelines has been a catalyst for renewed efforts to achieve uniformity. Eleanor Holmes Norton, Chair of the EEOC, indicated at her confirmation hearing in May 1977 that the Government should not be speaking with two voices on the subject of testing and employee selection procedures. Subsequently, officials in several agencies[99/] have again discussed the similarities and differences between the FEA and EEOC guidelines. As a result, in July 1977, there was some indication that the Government was closer to a uniform agreement on employee selection guidelines than ever before. As of mid-August, however, a uniform draft had not been agreed upon by the agencies concerned. Significantly, any recent progress towards uniform guidelines has been made outside the EEOCC, in informal discussions between Federal agencies.

98/ 42 Fed. Reg. 9491 (Feb. 16, 1977).

99/ These included CSC, DOJ, DOL, and EEOC.

CONCLUSION

This study is a progress report on the status of equal employment opportunity enforcement since July 1975 when this Commission issued Volume V of its series, The Federal Civil Rights Enforcement Effort--1974. More than 2 years have passed since that volume, entitled To Eliminate Employment Discrimination, was released, and a number of major events have occurred in that time.

In recent months, increased activity and concern for equal employment opportunity at all levels of the Federal Government have created a basis on which to rest hopes for a greatly improved Federal enforcement effort in the future. First, in February 1977, within three weeks of taking office, President Carter spoke of his intention to give priority to improving the Government's civil rights enforcement effort. In particular, the President noted that there are a number of agencies responsible for implementing equal employment opportunity requirements and stated that it was his goal to move toward a consolidation of these functions. President Carter's subsequent creation of a civil rights reorganization task force within the Office of Management and Budget demonstrates his strong commitment to end employment discrimination.

Second, and of equal importance, is the fact that the officials the President and his Cabinet members have appointed to head civil rights programs have, without exception, taken their tasks seriously. Indeed, the summer of 1977 may go on record as the period of greatest activity by civil rights agencies and offices since the Government established mechanisms to combat employment discrimination. The recent appointees have guided their agencies toward renewed efforts at interagency coordination, as is evidenced by the recent activity to develop a uniform set of employee selection guidelines for the Federal Government. Moreover, under the aegis of new leadership, agencies have demonstrated a renewed will to enforce the law firmly. For example, the Office of Federal Contract Compliance Programs reports significantly increased use of administrative hearings and sanctions where contract compliance violations have been found. The Department of Justice and the Equal Employment Opportunity Commission have continued to expand their litigation activities.

Third, and perhaps most significant, is the fact that under new leadership several agencies have openly engaged in a critical self-examination of their programs to protect against employment discrimination. The Civil Service Commission, the Office of Federal Contract Compliance Programs, and the Equal Employment Opportunity Commission have all proposed major changes in their operations as a result of self-audits, and many of the provisions in the proposals appear to offer promise for significant improvement.

The problems the Government is trying to solve, however, are difficult and persistent. In Volume V, this Commission reported that the Federal effort to end employment discrimination had "not been equal to the task," and in the year and one half between the publication of that volume and the end of 1976, Federal enforcement of equal employment opportunity laws had not measurably improved. Thus, in 1977 when new officials assumed responsibilities for equal employment opportunity enforcement, they were confronted with many of the same failings as were observed in Volume V. For example, the authorized staff levels and budgets of the contract compliance agencies continued to bear little relationship to the number of facilities for which the agencies were responsible--some compliance agencies had so few resources that they could not review all of their contractors even once in a twenty year period, while one agency had sufficient resources to review its largest contractors semiannually. The Department of Labor's activity to enforce the Equal Pay Act had diminished. The Equal Employment Opportunity Commission's charge backlog continued to rise sharply, and few of the cases that its district offices recommended for lawsuits were found by the agency's legal staff to be acceptable for litigation.

Federal employees were not offered the same basic protections under the Civil Service Commission's enforcement of Title VII that private employees enjoy by virtue of that same statute when it is enforced by the Equal Employment Opportunity Commission. The seriousness of the situation facing Federal employees is underscored by the fact that the same agency which develops the rules for Federal personnel practices also holds the responsibility for evaluating whether or not these practices are consistent with equal employment opportunity law. As a result Federal employees are faced with little more protection against employment discrimination than would be employees in the private sector if their own employers were the final authority on the lawfulness of their employment practices.

Beyond their individual shortcomings, the agencies did not collectively comprise an effective Federal effort. They disagreed with one another on matters of substantive policy, as is illustrated by their disputes over appropriate uniform Federal positions on such issues as employee selection guidelines and pension benefits. There also remained disagreement among the agencies as to the meaning of discrimination and how discrimination, once identified, should be remedied.

The Equal Employment Opportunity Coordinating Council, created by Congress in 1972 to eliminate conflict, competition, duplication, and inconsistency among the units of Federal Government responsible for implementing equal employment opportunity law, has almost completely failed to achieve its purpose. From July 1975 until it ceased being active in November 1976, it came to an agreement on only one major issue--affirmative action--and even this agreement glossed over areas of dissension, focusing instead on general principles.

As of October 1977, the more encouraging recent developments have not markedly changed this picture. By and large, the agencies now recognize their deficiencies and are working to eliminate them. However, most of the problems of 1975 and 1976 have not yet been eradicated. For the most part, the agencies' intentions are reflected only in efforts which are still in the stage of planning or early implementation. Moreover, each agency's plans are generally directed toward those areas over which it has authority, and thus are addressed toward internal changes only. The agencies' plans do not, for example, provide for adequate sharing of information, joint reviews and investigations, uniform compliance standards, or Government-wide acceptance of the findings of individual agencies, which would be possible if uniform standards were adopted. As a result, taken together, these plans do not add up to a comprehensive or coordinated program for improving the Federal effort to end discrimination.

In 1975, when the Commission observed the severe shortcomings in the Federal program to guarantee equal employment opportunity, it concluded that the creation of a single agency, applying one standard of compliance, would be the most effective cure. The Commission recommended the creation of a National Employment Rights Board to enforce one law prohibiting discrimination on the basis of race, color, religion, sex, national origin, age, and handicapped status. It urged that the Board be granted administrative, as well as litigative, authority to eliminate discriminatory employment practices and that the Board not be required to rely solely upon the receipt of complaints in order to act.

This Commission reaffirms its recommendation for the creation of a single agency, enforcing equal employment opportunity under a single law, and notes the growing acceptance of this concept. Following the issuance of Volume V, the House Subcommittee on Equal Opportunities held extensive hearings on equal employment opportunity enforcement, and on the basis of those hearings it issued a staff report with recommendations which encompassed the basic principles of the Commission's proposal. Likewise, the Congressional Black Caucus engaged in a study of equal employment opportunity enforcement and generally concluded that consolidation and restructuring was needed. Indeed, the President's own actions recognized the need for consolidation.

The Commission's recommendation in Volume V for an entirely new agency was based upon the realization that there was no immediate prospect for stepped-up enforcement by any existing Federal unit. However, the recent positive efforts of Federal agencies cast a new light on how a consolidation ought best proceed. Many of the major improvements which have been initiated deserve a chance to be tried, and the creation of a totally new entity at this time might therefore be counterproductive. It is the Commission's view that currently the Government can most effectively achieve its goal of improved equal employment opportunities by reducing the number of Federal agencies to which enforcement responsibilities are assigned, consolidating related equal employment opportunity functions in this cluster of agencies.

Simultaneously, the administration should introduce new legislation which would create a more unified statutory equal employment opportunity scheme. These actions, taken together, would provide a foundation for a more comprehensive consolidation in the future.

There are, however, certain elements of consolidation which must be met immediately by any reorganization if it is to remedy the defects which the current structure imposes upon the officials responsible for enforcing Federal equal employment opportunity law:

1. The policy of the Federal Government on equal employment opportunity matters must be reflective of those principles of equal employment opportunity which provide for the strongest protection of those classes of persons who have historically been and continue to be victimized by employment discrimination. In this regard, generally established Title VII standards and Equal Employment Opportunity Commission guidelines should form the core of the Federal Government's equal employment opportunity policies.

2. The guidance which the Federal Government supplies to employers on equal employment opportunity matters must be uniform. Regardless of whether the individual victims of employment discrimination are applicants for or employees of Federal, State, or local governments or the private sector, they should be afforded the same full protection against employment discrimination. Employers are entitled to a single set of instructions on such matters as hiring, promotions, leave, fringe benefits, and terminations.

3. There must be consistency in the Federal approach to responsibilities for investigating and remedying employment discrimination. Methods of complaint investigation and standards used to determine whether complaints

have merit should proceed on the basis of a single Government-wide understanding as to what constitutes a prima facie case of discrimination. This standard should apply whether a complaint is brought under Title VII of the Civil Rights Act of 1964, Executive Order 11246 as amended, the State and Local Fiscal Assistance Act of 1972 as amended, or any other statutory or executive authority. Likewise, a single Government-wide standard must exist as to what constitutes acceptable affirmative action plans and what constitutes noncompliance with such plans, whether such plans are entered into as a result of Title VII negotiations or by virtue of affirmative action requirements under the Government's contract compliance program.

4. There must be sharing of data, joint investigations, and joint reviews wherever more than one agency has jurisdiction over the practices of one employer.

5. There must be a final authority on executive branch implementation of equal employment opportunity. Where differences exist among Federal agencies, the Government must have the capacity to reach a prompt resolution of the issue. The Federal Government should immediately begin to speak with one voice on equal employment opportunity matters.

The Commission on Civil Rights considers these objectives to constitute essential features of its original recommendation in Volume V. The Commission believes any viable reorganization plan must, at a minimum, meet these objectives.

It is important, too, that a reorganization comprising these elements be accomplished as quickly as possible. If the Government is to give credibility to its commitment to equal employment opportunity and convince employers, employees, civil rights groups, and the general public that it means to enforce the law, reorganization planning must not be an end in itself. It is essential that the Government devote its efforts to carrying out a revitalized program without delay.